

¹ Although Ms. Holleran testified at the hearing that “We don’t have a general objection to them making the addition . . .,” (Tr. 15), her post-hearing letter (Exhibit 40(a)) attacks the density, scale and design of the proposed addition and raises other concerns. The Hearing Examiner therefore classifies her position as being opposed to the petition.

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I. STATEMENT OF THE CASE

A. Procedural History

On October 9, 2009, Petitioners Korean Community Senior Housing Corporation of Maryland, Inc. and Korean Community Senior Housing Corporation of Maryland, Inc. II,² filed a petition to modify an existing special exception for senior housing at 440 East University Boulevard, Silver Spring, Maryland. The site is zoned R-60, a single-family zone which permits senior housing under Zoning Ordinance §59-G-2.35, as a special exception. The existing facility currently operates under the name “University Gardens” and has been in operation since 1992, providing housing for low income persons pursuant to federal programs administered by the federal Department of Housing and Urban Development (HUD).³ Petitioner proposes to construct a new four-story addition containing 25,400 square feet of floor area to connect to the existing facility. The addition will provide 27 additional one bedroom units for low-income seniors and a community room. The special exception site consists of 2.08 acres (90,457 square feet) of land. Exhibit 3.

Notice of a public hearing for March 5, 2010, was issued on October 29, 2009. Exhibit 14. On February 1, 2010, the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed its Report (Exhibit 16),⁴ which recommended approval of the Petition, with conditions. A revised Landscape and Lighting Plan (Exhibit 28) was approved by Staff on February 18, 2010 (Exhibit 29). On February 19, 2010, the Montgomery County Planning Board voted unanimously to recommend approval, with conditions as outlined in the Technical Staff report (Exhibit 17).

² Petitioner, Korean Community Senior Housing Corporation of Maryland, Inc., is the fee simple owner of the Subject Property, and Petitioner, Korean Community Senior Housing Corporation of Maryland, Inc. II, is the entity securing the financing for the construction of the addition at the Subject Property. Exhibit 3.

³ The special exception resolution authorizing senior housing was entered on July 28, 1987, but the facility did not begin actual operations until 1992. Tr. 12. On August 31, 2005, a telecommunications tower was permitted on the roof pursuant special exception S-2639, and the Board simultaneously granted an administrative modification to S-1424 to permit the added cell tower. The cell tower special exception is unaffected by the current modification petition.

No input from the community was received either by Technical Staff or the Hearing Examiner prior to the hearing. The hearing was held, as scheduled, on March 5, 2010, and Petitioners called six witnesses. One member of the community, Linda Holleran, testified on her own behalf and as President of the Buckingham Terrace Homeowners Association (BTHOA). Martin Klauber, the People's Counsel, participated in the hearing in support of the petition. Tr. 148.

The record was held open until April 16, 2010, for additional filings by Petitioner, review by Technical Staff and any additional community comments. Petitioner made additional filings, including revised plans, on March 16 and 18, 2010 (Exhibits 33 and 34), and Technical Staff completed its review on March 19, 2010, approving the proposed revisions (Exhibit 35). On March 26, 2010, the Planning Board approved the Preliminary Forest Conservation Plan (PFCP, Exhibit 39(c)). Ms. Holleran submitted comments on April 5, 2010 (Exhibit 40), and Petitioners responded thereto on April 9, 2010 (Exhibit 41). The record closed, as scheduled, on April 16, 2010, and by Order of May 17, 2010, the Hearing Examiner extended the time for filing his report until June 4, 2010.

B. Scope of the Review

Zoning Code §59-G-1.3(c)(4) provides that the public hearing on modification applications must be limited to discussion of those aspects of the special exception use that are directly related to the proposed modifications; however, if the total floor area will be expanded by more than 25% or 7,500 square feet, and the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, “[t]he Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26.”

⁴ The Technical Staff Report is frequently quoted and paraphrased herein.

In the subject case, the planned construction of a four-story addition, as shown on the site plan (Exhibit 33(f)), will expand the floor area by 25,400 square feet (*i.e.*, more than 7,500 square feet). Thus, the first prong of the provision has been exceeded. The second part of the test is a little more difficult because the use will still be a residential facility for seniors, and therefore one could argue that its nature and character does not change; however, that cannot be the meaning of the statutory language, for if it were, then any increase in size, no matter how large and intrusive, would be insufficient to invoke the specified additional scrutiny, as long as the use itself remained the same. We therefore look to the size of the increase, both physical and operational, to help determine whether the terms of the underlying special exception must be reviewed.

In this case, the addition will increase the floor area from approximately 43,320 square feet to 68,720 (a 58% increase) and will increase the number of residential units from 65 to 92 (a 41% increase). Exhibit 16, pp. 2-3. The expansion will also create a four-story building behind the existing building, in an area which is presently open space.

Given the proportions of the increase in the use and the visual impact of a four-story building on adjacent property owners, the Hearing Examiner finds that its nature and character would change to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. In the typical special exception, the Board could therefore require, pursuant to Zoning Code §59-G-1.3(c)(4), that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26. However, special exceptions for senior housing have a grandfathering provision built into the Zoning Ordinance. Section 59-G-2.35 (h)(1), specifies the following:

A housing facility for senior adults or persons with disabilities existing before May 6, 2002, is a conforming use and structure, and may be continued in accordance with the terms and conditions of the special exception grant. Modifications may be approved that are in compliance with the special exception

standards in effect at the time the modification is filed. If damaged, the facility may be rebuilt, repaired or reconstructed as it existed on May 6, 2002.

Thus, under the terms of this language specific to this type of special exception, only the proposed modifications must be in compliance with the current standards. Having examined these requirements, the Hearing Examiner concludes that the petition should be granted, but with landscaping buffers and conditions which will adequately protect the neighbors from adverse effects caused by the proposed modification.

II. FACTUAL BACKGROUND

A. The Subject Property and Surrounding Neighborhood

The subject property is located at 440 East University Boulevard in Silver Spring and consists of 2.08 acres on part of Lot 11, Block 2, Buckingham Terrace. It is rectangular in shape and is situated on the east side of East University Boulevard, approximately 150 feet north of Buckingham Drive, as shown below on Staff's "General Location Map." Attachment 1 to Exhibit 16.



Because of the road divider which can be seen on the above map, access to and from the property is restricted to a right in from University Boulevard and a right out movement onto University Boulevard. Currently, the property is developed with a four-story senior housing building and a 37-space parking facility. The existing building contains approximately 43,320 square feet of floor area, and can be seen in an aerial photo (Exhibit 13(d)), a portion of which is reproduced below:



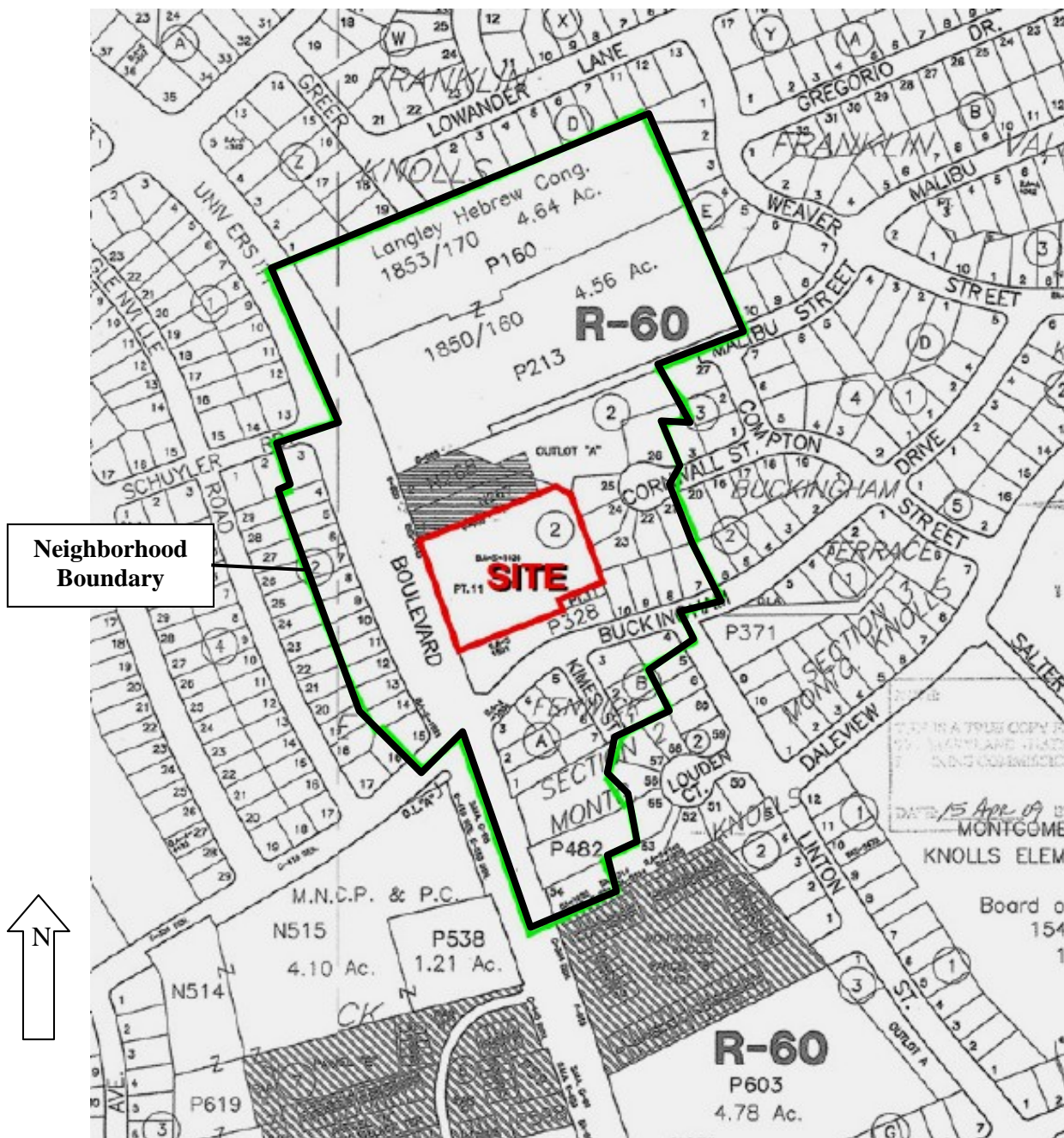
Technical Staff reports that the property is well landscaped along the road frontage and the northern and southern property lines. Exhibit 16, p. 3. As can be seen from the above photograph, the part of the site behind the existing building, where the addition will be placed, is largely undeveloped.

The topography of the site was described by Petitioners' land planner, John Sekerak. There is a berm along the frontage of University Boulevard, and the grades descend as one goes eastward towards the rear of the property. Tr. 25. There are also fences around much of the perimeter of the property, landscape materials put in at the time of the initial construction back in 1991, and open areas to the rear of the property with both a lawn and a resident gardening area. Petitioners' architect, Scott Knudson, pointed out that there is also an area, about midpoint behind the existing building, which has an elevation about 10 feet higher than the area south of that hill where the addition will be located. Tr. 99-100.

The subject site is in the R-60 Zone, as are the adjoining, single-family, detached homes to the east of the site. Immediately north of the site are the Buckingham Terrace Townhouses, which front on Gloucester Knoll Drive and are in the RT-15 Zone. The only opposition in this case comes from the Buckingham Terrace Homeowners Association.

Technical Staff proposed a definition of the general neighborhood bounded by Melbourne Avenue to the north, Northwest Branch Park to the east, Piney Branch Road to the south and Long Branch Road to the west. Exhibit 16, p. 3. Petitioners' land planner argued that the neighborhood as defined by Technical Staff is much too large and includes properties that have no practical relationship to the subject property, especially given that the proposal is for a modification, not a new development. Tr. 35. He introduced a Neighborhood Delineation and Zoning Map (Exhibit 21), on which he outlined what he considers the applicable neighborhood, in green. It shows East University Boulevard, a six-lane highway, as a significant delineator of the neighborhood to the west; however, he did include those residences directly confronting the subject site on the west, across University Boulevard, within his defined neighborhood. Even though they may not have direct view of the 27-unit addition, they have direct visual relationship to the subject property. The

other extension of the neighborhood would be to include the place of worship just a couple properties to the north of the subject property, as well as those residences to the rear of the property (*i.e.*, to the east) that may have a direct visual connection to the property. The eastern boundary is set there because there is no direct vehicular or pedestrian interaction between properties further to the east and the subject site. On the south, residences along Buckingham Drive and East University Boulevard are included, down to the Montgomery Knolls townhouse development. Exhibit 21 is reproduced below:



Technical Staff did not supply a map showing the extent of its recommended general neighborhood, but it clearly extends far beyond the area of any potential adverse impact from the proposed modification. As will be discussed later in this report, very little traffic will be produced by the new elderly residents of the proposed addition, and the proposed building will not be visible beyond the adjacent properties to the north, south and west. It therefore is not justifiable to define the general neighborhood as extending about a half a mile to the south, as Technical Staff suggested. The Hearing Examiner finds that Mr. Sekerak's proposed general neighborhood, as shown on Exhibit 21, is appropriate.

The defined neighborhood is all in R-60 Zone, with the exception of the RT-15 townhome properties (Buckingham Terrace) directly abutting the site to the north. The properties to the east and south contain single-family detached homes, and there is also a non-resident medical practitioner's office special exception (S-1591) abutting the subject property to the south. The area west of the property, across East University Boulevard, consists of single-family detached homes. A wireless cell antenna exists on the roof of the existing facility under special exception S-2639, and there is an accessory apartment (S-1081) at the corner of East University Boulevard and Wayne Avenue.

B. The Master Plan

The property at issue is subject to the *2000 East Silver Spring Master Plan*. The "Vision Division" of Technical Staff found the proposed modification to the existing senior housing to be consistent with the recommendations of the applicable Master Plan. Technical Staff commented as follows (Exhibit 16, p. 5):

The special exception modification is consistent with the *2000 Approved and Adopted East Silver Spring Master Plan*.

The master plan does not contain specific recommendations for this particular site. The Plan's proposed land use map recommends the site for "Elevator Apartments" but there is no further recommendation for the site. However, one of the main goals of the Plan is to preserve the existing residential character of the area. The Plan's land use recommendations encourage neighborhood reinvestment and maintaining social diversity. Staff concludes that the proposed project meets these goals. By providing more affordable senior housing in the area this project provides an opportunity for more senior residents to reside in the community.

Petitioner's land planner agreed, noting that the Master Plan is replete with references to protecting the existing residential neighborhoods and assuring that any development, redevelopment and special exception uses are compatible with the residential character of the neighborhood. In Mr. Sekerak's opinion, the special exception modification will not increase the number, density or scope special exception uses in a way that's inconsistent with the Master Plan or that will adversely affect the residential nature of the area. The proposed addition will be a modest increase to existing housing for the elderly, and it will not add any additional special exception use. Tr. 31-32, 36-37.

The Master Plan supports the current R-60 Zone, which permits the proposed use by Special Exception. Given this fact, and the observations of Technical Staff and Mr. Sekerak, the Hearing Examiner finds that the proposed modification is consistent with the goals of the applicable Master Plan.

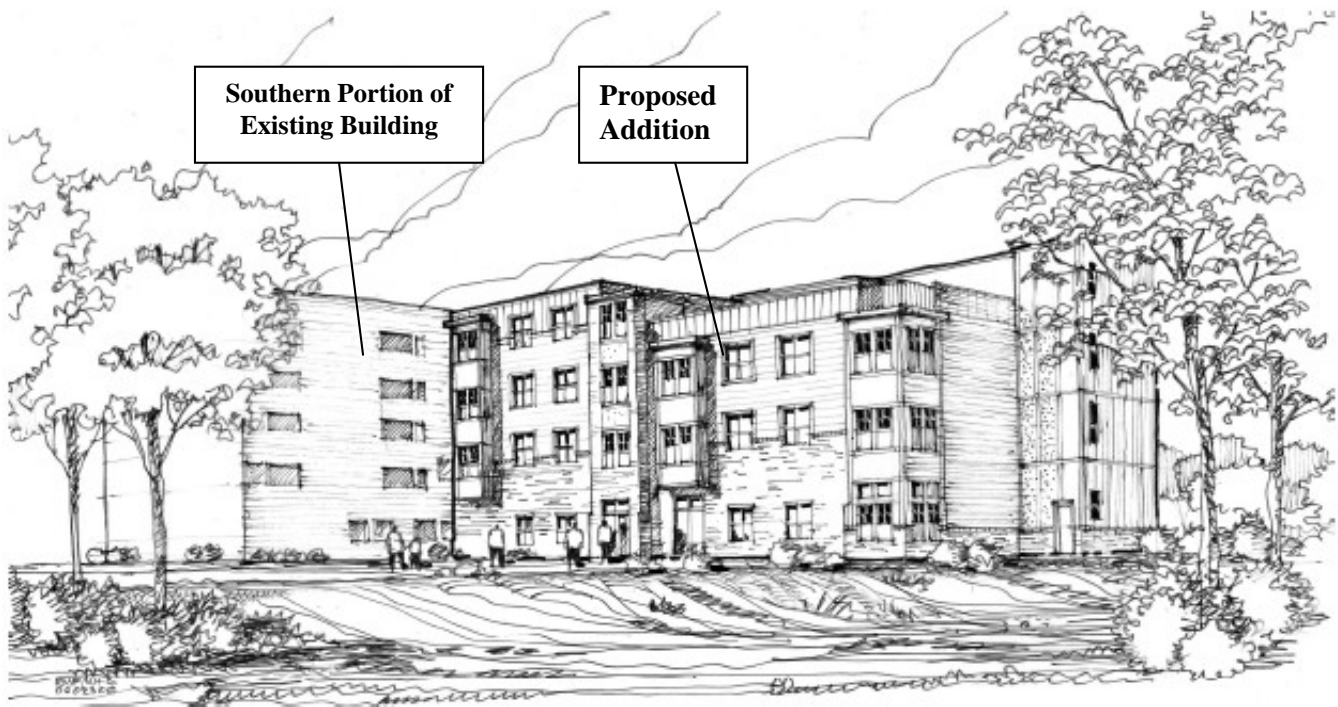
C. Proposed Use

The existing building consists of approximately 43,320 square feet and contains a total of 65 units, of which 48 are one-bedroom, 16 are efficiencies and one is a two-bedroom unit occupied by an on-site housing manager. Tr. 123. All of the units, both existing and proposed, are for very low income seniors. There is also an office, recreational rooms, a library, a kitchen and a laundry room. Petitioners seek to modify the existing special exception to:

- (1) permit construction of a new four-story, 25,400 square-foot, addition to the existing facility;
- (2) provide 27 one-bedroom units within the new addition;

- (3) enclose the 80-square foot front door entrance area;
- (4) relocate the existing shed to the rear of the property;
- (5) remove any reference to a shuttle bus because the shuttle bus is not necessary due to the multiple modes of public transportation;
- (6) replace and relocate the entrance sign; and
- (7) re-stripe the parking area to improve the dimensions of ADA spaces (without adding new spaces).

There will be no new staff members, no change in hours and no additional parking. Petitioners' vision for the completed addition, as viewed from the southeast (Exhibit 8), is shown below:



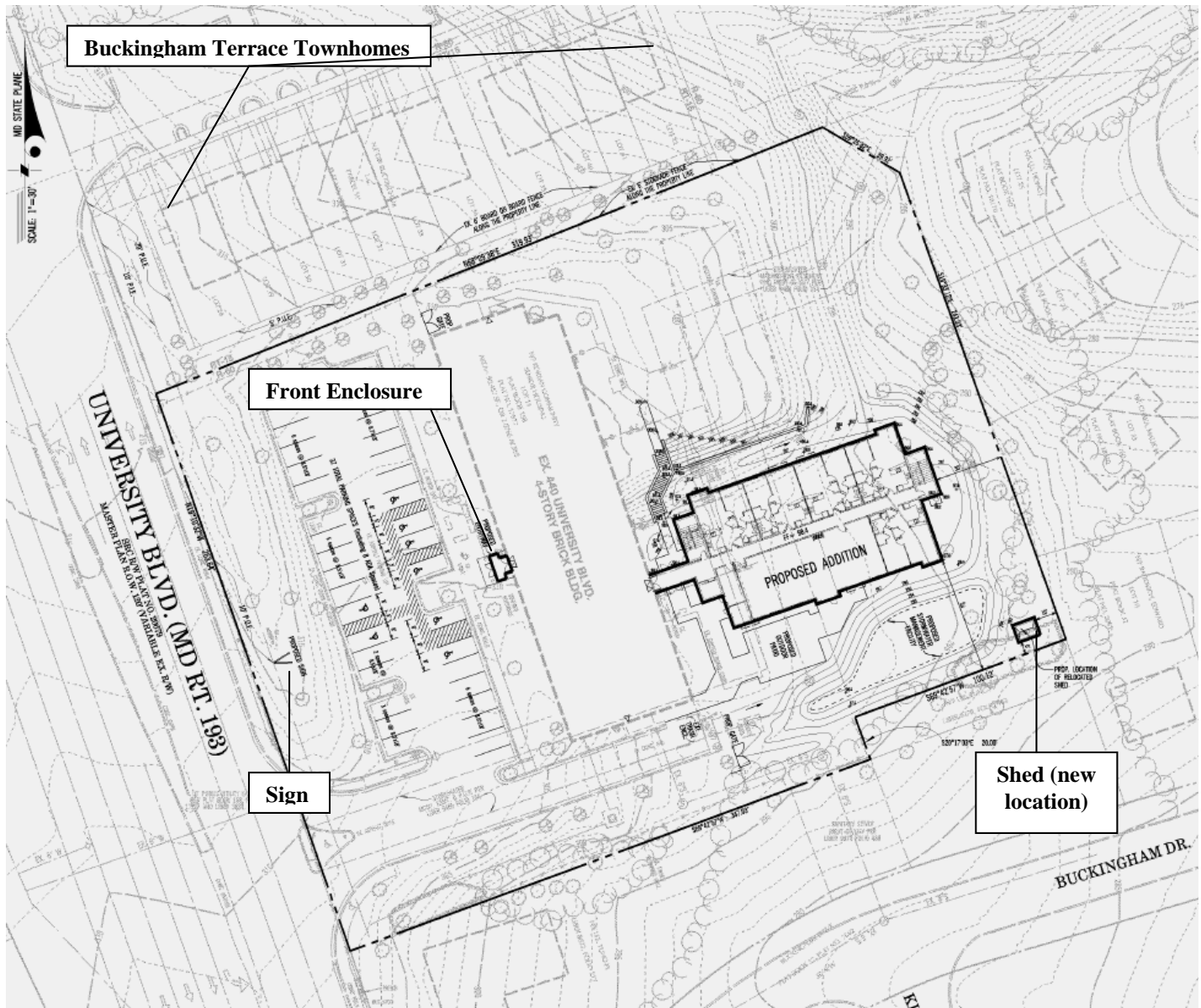
The Proposed Addition to the Facility:

The proposed addition will be connected to the rear of the existing four-story building by an enclosed corridor at the Terrace (ground) level in the back.⁵ The new building will also provide a community room with a walk-out patio area for the residents. The proposed addition will be set back approximately 60 feet from the nearest single-family homes to the east (30 feet from the property

⁵ There were originally going to be connections at two levels, but that plan was modified at the hearing (Tr. 124-127), and a revised floor plan (Exhibit 33(b) and (j)) was submitted and approved by Technical Staff thereafter.

line). The façade of the new building, facing the nearest residences, will be articulated with a portion of the addition stepping down to three stories, as can be seen in the above architect's sketch.

The final site plan layout for the addition (Exhibit 33(f)) is reproduced below:



As can be seen on the site plan, the proposed addition will be erected perpendicular to the existing building, but south of the center line of the existing building, which moves it further away from the townhouses to the north and takes advantage of the ten-foot drop in grade at that point. Tr. 99-100.

The remainder of the site plan consists of General Notes, Development Standards, a Parking Tabulation and an Area Tabulation, all of which are set forth below:

DEVELOPMENT STANDARDS (Housing and Related Facilities for Senior Adults and Persons with Disabilities in the R-60 zone)

	Req'd/Permitted	Proposed
Lot Area (59-C-1.322(a)):	6,000 s.f. min.	2.08 ac.
Lot Width (59-C-1.322(b)):		
- At Front Building Line:	60 ft. min.	266 ft.
- At Street Line:	25 ft. min.	264 ft.
Setback from Street (59-C-1.323(a)):	25 ft. min.(1)	115 ft.
Setback from Adjoining Lot:		
- One Side (59-C-1.323(b)(1)):	8 ft. min.	
- Sum of Both Sides (59-C-1.323(b)(1)):	18 ft. min.	
- Rear (59-C-1.323(b)(2)):	20 ft. min.	
- Side and rear (59-G-2.35(c)(1)(B)):	25 ft. min.	22 ft. min.(2)
Accessory Building Setback (59-C-1.327):		
- from rear lot line:	5 ft. min.	10 ft.
- from side lot line:	5 ft. min.	6 ft.
Building Height (59-C-1.327):	30 ft. max.(2),(3)	36.7 ft.(4)
(59-G-2.35(c)(2)):	4 stories max.(5)	4 stories(6)
Building Coverage (59-C-1.328):	35% max. of NLA	20%
Green Area (59-G-2.35(c)(4)):	50% min.	64%

(1) Established Building Line not applicable for alternations or additions to an existing building (59-A-5.33(a)).

(2) The existing building is a conforming structure (59-G-2.35(h)(1)). All modifications will be in compliance with standards current at the time of modification approval. Many of the R-60 setbacks are modified by the Special Exception standard.

(3) See Zoning Ordinance for additional details of how building height is determined relative to roof type, nearby structures, and Planning Board approval.

(4) The R-60 maximum building height development standard is modified by the Special Exception standard that is expressed by number of stories. The information for proposed height expressed in feet regards the existing structure, is dimensionally unaffected by the proposed addition, and is provided for informational purposes only.

(5) Four stories permitted. Additional height up to six stories is permitted if the additional height is in conformity with the general character of the neighborhood considering population density, design, scale and bulk of the proposed building, traffic and parking conditions.

- (6) - Weighted avg. elev. of the fin. grade along the perimeter of the bldg.= 302.72 FT
- Cellar/Basement Elevation= 298.40 FT
- Avg. height of grade above cellar/basement= 4.32 FT
- Ceiling Height: (height in most regularly occupied areas)= 8.50 FT*
- 1/2 Ceiling Height= 4.25 FT
- Cellar/Basement Elevation + 1/2 Ceiling Height= 302.65 FT (Lower than 302.72 FT avg. elev., therefore is considered a cellar.)

* Clear ceiling heights vary in both existing building and proposed addition from 8'-0" in existing building lower level to 11'-0" in proposed addition utility room. For the purposes of this calculation the 8'-6" height of the hallway and living units of the addition was used as best representing the applicable ceiling height.

GENERAL NOTES

- The purpose of this plan is for the modification of the existing 65 unit Special Exception S-1424 (Housing for the Elderly) requesting the addition of 27 dwelling units of Housing and Related Facilities for Senior Adults and Persons with Disabilities for a total of 92 units.
- Boundary information shown is based on ALTA boundary survey prepared by Thoth Land Surveying Professionals dated March 2009.
- Topographic information is one foot contour interval from topographic survey prepared by Thoth Land Surveying Professionals. Surrounding property information is from M-NCPPC GIS.
- NRI/FSD # 42009205E has been approved for this site on September 3rd, 2009.
- Water and Sewer Category: W-1 & S-1 respectively.
- This site is within the 2000 East Silver Spring Master Plan area.
- This site is within the Silver Spring / Takoma Park Transportation Policy Area.
- This site is within the Northwest Branch Watershed (Class IV).
- This plan is not for construction purposes. See the approved Stormwater Management Concept and subsequent detailed plans for utility information.

PARKING TABULATION (Southern Parking Policy Area 59-E-3.7)

64 ex. 1 bedroom/efficiency d.u. @ 0.50 spaces/d.u.	= 32.00 spaces
+ 1 ex. 2 or more bedroom d.u. @ 0.65 spaces/d.u.	= 0.65 spaces
+ 27 prop. 1 bedroom d.u. @ 0.50 spaces/d.u.	= 13.50 spaces
Subtotal parking spaces required	= 46.15 spaces min.
- 20% reduction for providing MPDU's (59-E-3.33)	= 9.23 spaces
Total parking spaces required	= 36.92 spaces min.

Parking spaces provided = 37 spaces (1)

- (1) The site currently has 37 existing parking spaces. Parking facility modifications are limited to restriping the existing facility to dimensionally improve the accessible spaces to current standards while the total number of spaces remains at 37 including 8 accessible spaces, 2 of which will be designated as van accessible spaces. Facilities for motorcycles or bicycles are not existing, required, or proposed.

AREA TABULATION

Lot 11, Block 2 lot area (Plat 17977)	= 92,459 s.f.(2.12 ac.)
- Previous conveyance (L.9378, F.485)	= 2,000 s.f.(0.05 ac.)
- Previous dedications to public use	= 0 s.f.(0.00 ac.) (1)
Residue	= 90,459 s.f.(2.08 ac.)
- Proposed future dedication to public use	= 0 s.f.(0.00 ac.)
Future Net Lot Area (NLA)	= 90,459 s.f.(2.08 ac.) (2)

- (1) Possible previous dedications not identified. Determination of Gross Tract Area is unnecessary for this application.

- (2) Area as determined by fields survey.

Elevations (Exhibit 33(c) and (k)) and floor plans for the first floor (Exhibits 33(b) and (j)) and for the terrace level (Exhibit 6(e)) are reproduced below:



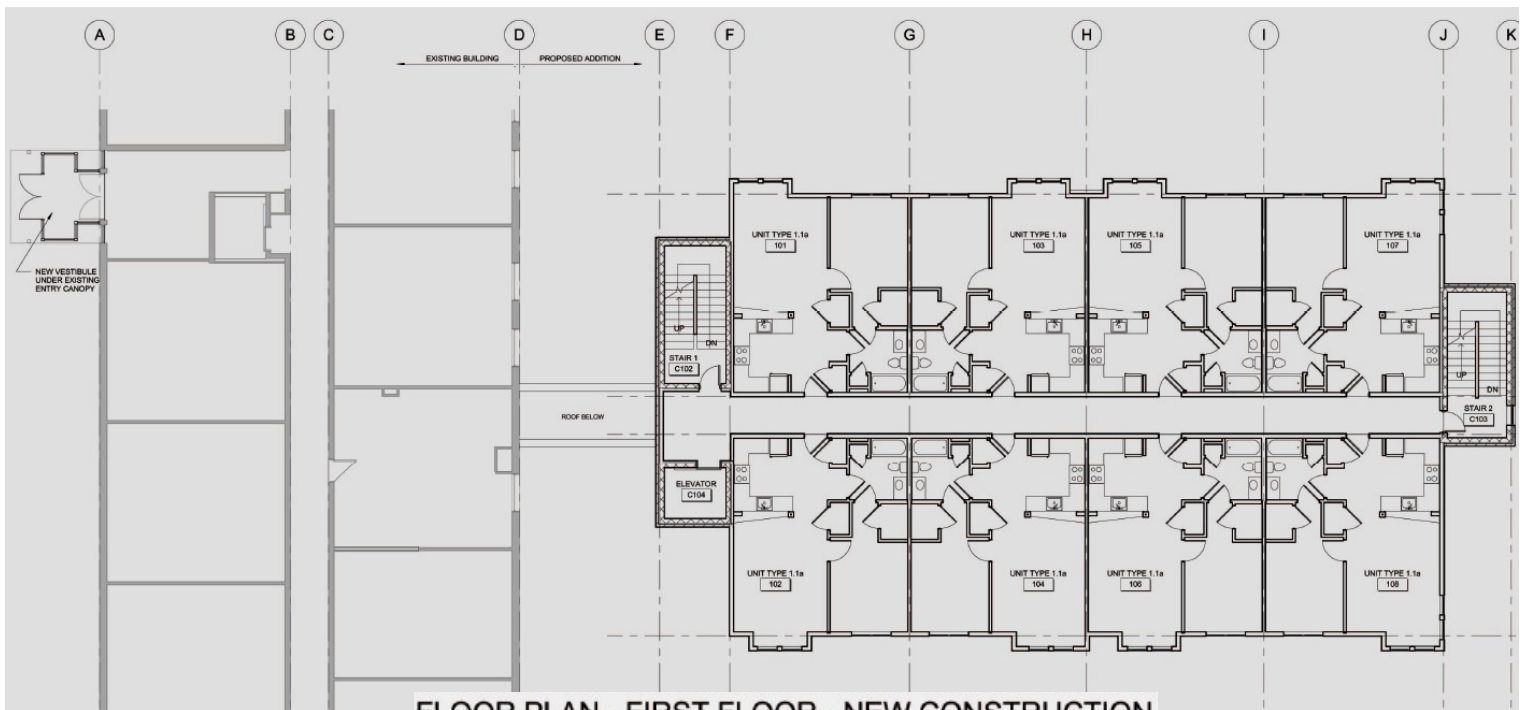
SOUTH ELEVATION

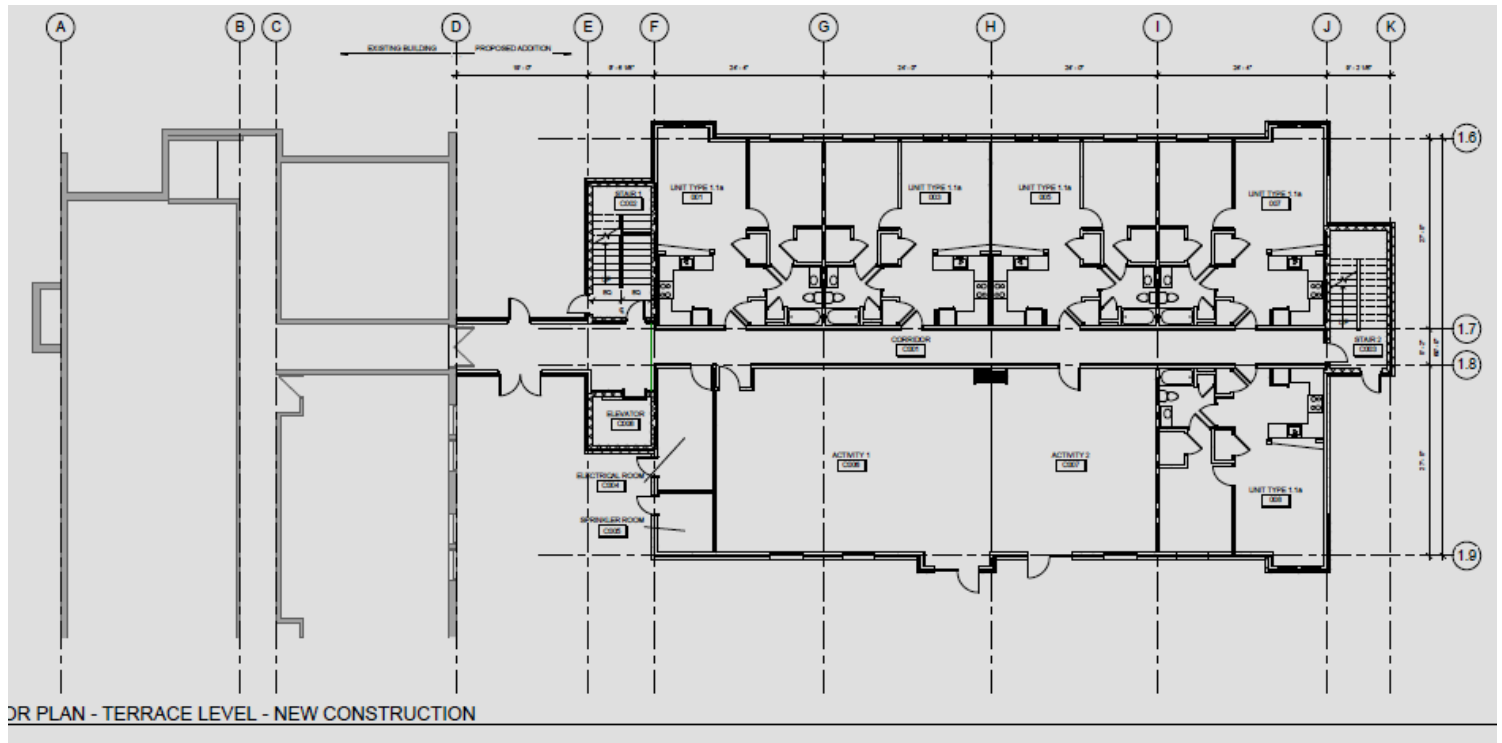


EAST ELEVATION



NORTH ELEVATION

FLOOR PLAN - FIRST FLOOR - NEW CONSTRUCTION
1/8" = 1'-0"



Scott Knudson, the architect for the proposed addition, testified that the addition will be completely behind the existing building and shorter than it. The addition will therefore be essentially invisible from University Boulevard. Although the walls of the addition will not directly abut the walls of the existing building to allow light to reach the individuals with windows in the back, the two buildings will function as a single, united whole.

Mr. Knudson further testified that the proposed addition will be ADA compliant. There will be full accessibility into the public spaces in the common areas and the corridors, and three of the units will be handicap accessible to meet uniform federal accessibility standpoints.

In Mr. Knudson's opinion, the proposed addition will comply with the Zoning Ordinance requirements for a special exception in a residential zone regarding compatibility and exterior appearance. It will maintain consistency with the context in terms of scale and size. It will be slightly lower than and not as long as the existing apartment building. It also steps down at the rear

as it approaches the single-family homes, and the building will be sited to take advantage of the topography to reduce its apparent scale. Finally, materials that are residential in feel and are typical of buildings of this type will be used (brick and siding), with window fenestration patterns that are very residential in scale and style.

In Mr. Knudson's opinion, the proposed addition will be in harmony with the general character of the neighborhood considering the design, scale, height and bulk of the proposed addition. It will also be well-related to the surrounding area in its siting, scale, bulk, height, materials and textures, and will have a residential appearance throughout. It will look very much like most residential multi-family buildings in the County. Tr. 88-111.

Technical Staff agreed, finding that the siting and orientation of the proposed building will "minimize the appearance of bulk and mass as it appears from the nearest residential homes." Exhibit 16, p. 13. The Hearing Examiner notes that the Board already found, in its 1987 grant of the special exception, that "this portion of University Boulevard contains 'mixed uses', both in size, bulk and use, thus the proposed [now existing] building will not be incompatible with the neighborhood." Board Opinion, p. 8.

The Front Entrance Enclosure and Movement of the Shed:

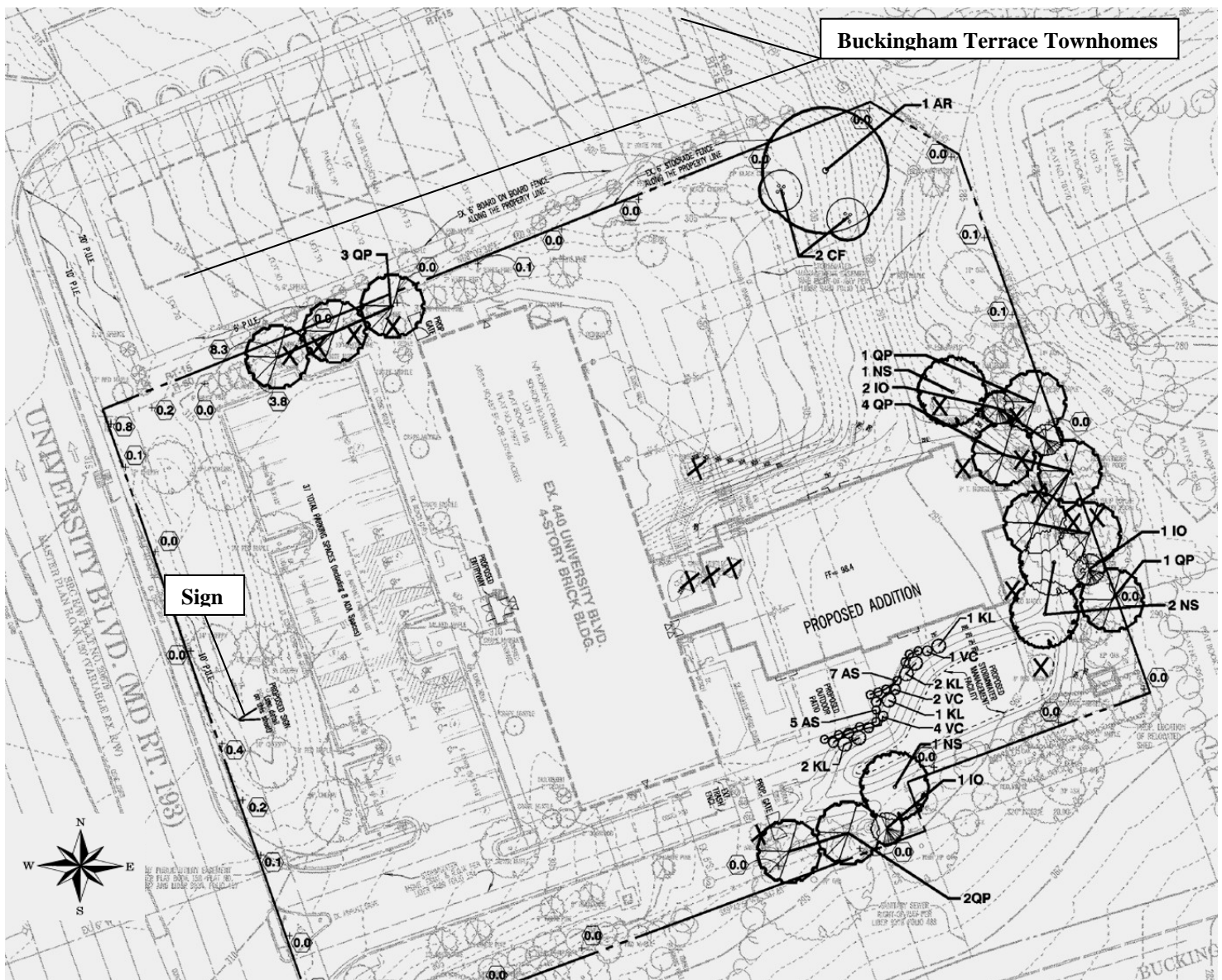
Two structural modifications are proposed that are independent of the new addition. Both are shown on the site plan. Petitioners propose to enclose the 80-square foot area under the existing roofed, front door entrance, to provide a weather-protected foyer. The glass enclosure is for the convenience of the residents and for the conservation of heating and cooling. It will provide a weatherized access to the front of the building, without expanding the roof area. Tr. 27 and 95.

The second change relates to the existing wooden shed. It is currently located at the end of the entrance drive immediately behind the southeastern corner of the existing building. The shed

would be relocated to the back (*i.e.*, southeast) corner of the subject property in order to keep it in the rear yard area once the new addition is built (*i.e.*, behind the new addition). It will have sufficient setbacks in its new location to more than meet the R-60 Zone setback requirements for an accessory structure.

Landscaping and Lighting:

The revised Landscape and Lighting Plan for the subject site (Exhibit 33(g)) is reproduced below and on the following page:



PLANT LIST

KEY	QTY	BOTANICAL NAME/COMMON NAME	SIZE	METHOD	SPACING	COMMENTS
Deciduous Trees						
NS	04	Nyssa sylvatica/ Black Gum	2 1/2"-3" Cal.	B&B	AS SHOWN	
QP	12	Quercus palustris/ Pin Oak	3"-3 1/2" Cal.	B&B	AS SHOWN	
AR	01	Acer rubrum/ Red Maple	2 1/2"-3" Cal.	B&B	AS SHOWN	
CF	02	Cornus florida/ Flowering Dogwood	2 1/2"-3" Cal.	B&B	AS SHOWN	
Evergreen Trees						
IO	04	Ilex opaca/ American Holly	6'-8'ht.	B&B	AS SHOWN	1 MALE/3 FEMALE
Shrubs						
AS	12	Azalea 'Shugetsu'/ Autumn Moon Azalea	1'-2'ht.	Cont.	AS SHOWN	
VC	07	Viburnum carlesii/ Koreanspice Viburnum	2'-3'ht.	Cont.	AS SHOWN	
KL	06	Kalmia latifolia/ Mountain Laurel	2'-3'ht.	Cont.	AS SHOWN	

GENERAL NOTES

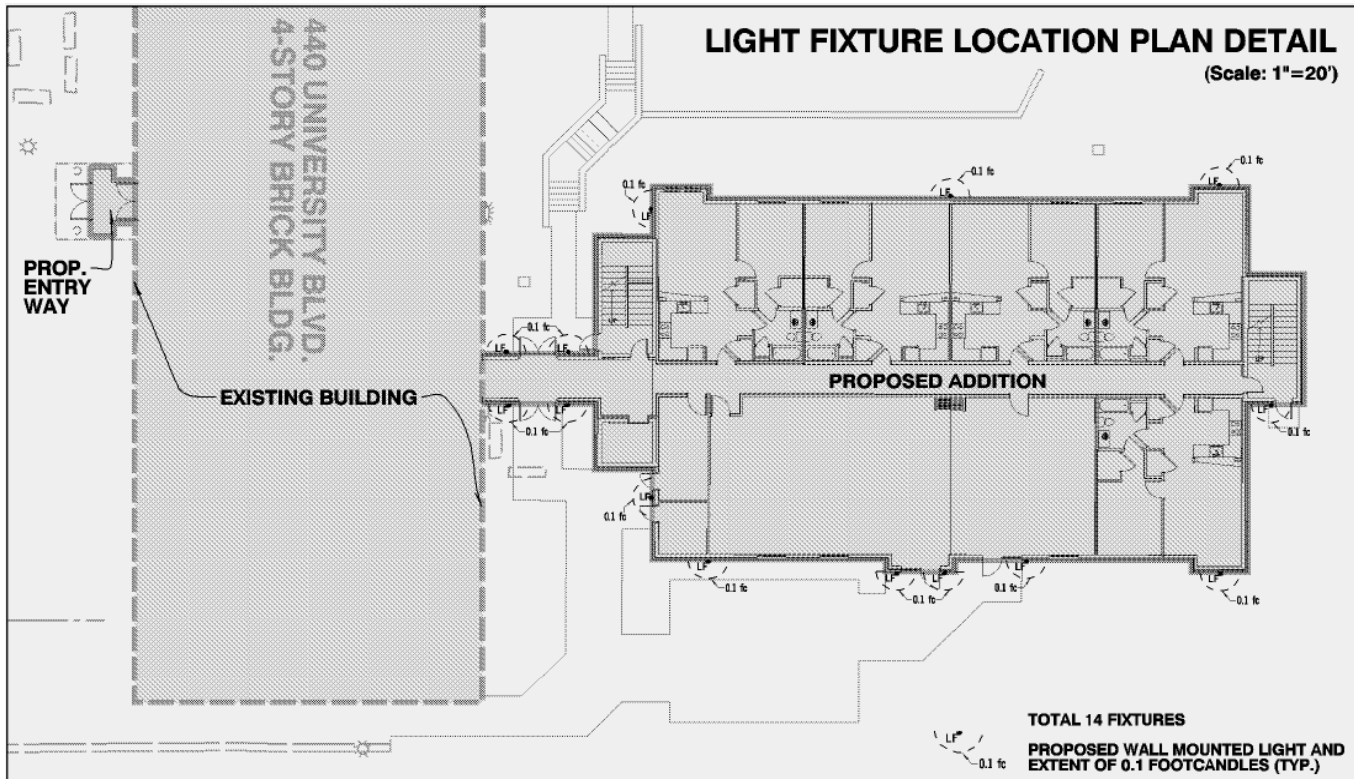
- This Landscape & Lighting Plan is in support of a Special Exception Amendment application for Housing and Related Facilities for Senior Adults and Persons with disabilities. The amendment proposes to modify Special Exception S-1424 by adding an additional 27 dwelling units of Housing and Related Facilities for Senior Adults for a total of 92 units.
- The landscaping aspect of this plan identifies those proposed plantings relevant to the Special Exception Amendment Application. Additional plantings of an ornamental nature may be provided at the discretion of the owner.
- Boundary information shown is based on ALTA boundary survey prepared by Thoth Land Surveying Professionals dated March 2009.
- Topographic information is one foot contour interval from topographic survey prepared by Thoth Land Surveying Professionals. Surrounding property information is from M-NCPPC GIS.
- This plan is not for construction. The locations of existing underground utilities are shown in their approximate locations as per available utility company records. The exact location of all underground utilities should be verified by "Miss Utility" (1-800-257-7777) prior to any excavation. Greenhorne & O'Mara, Inc. does not express or imply an guarantee or warranty as to the location or existence of any underground utility.

PHOTOMETRIC INFORMATION

Photometric readings were taken on 03/08/10 from 7:30p-8:30p.
by: Devin Kennedy of Greenhorne & O'Mara.

LIGHT METER: Reed Instruments Model ST-1301
Foot Candle was the unit of measurement used,
with accuracy to the nearest 00.0.

SITE CONDITIONS: 55 degrees, clear night.



Type:
Job:
Catalog number:

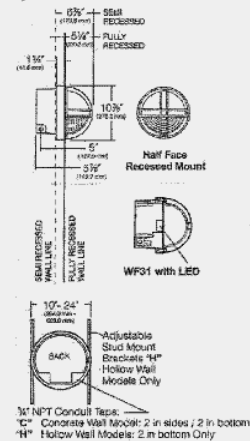
Fixtures Lens Electrical Module Finish Options
See page 2 See page 3

Wall Forms® WF31C and WF31H
Half Face Recessed Mount, Round
revision 10/1/08 • wfl1.pdf

Approvals:

Date:
Page: 1 of 3

Specifications



Housing:
Recessed Concrete: Die-cast, low copper (0.6% Cu) aluminum alloy with clear anodize under powder coat finish to match upper and face plate. Integral junction box (21 cubic inch volume) with four 1/4\" NPT conduit taps. Presswood niche cover provided as temporary protection against moisture.
Recessed Hollow Wall: Die-cast, low copper (0.6% Cu) aluminum alloy with clear anodize under powder coat finish to match upper and face plate. Integral junction box (21 cubic inch volume) with four 1/4\" NPT conduit taps. Presswood niche cover provided as temporary protection against moisture.
HID: Supplied with adjustable stud mount brackets plus insulation detector in place of one side conduit tap. Quick disconnect plug supplied for electrical module.

Face Plate: Die-cast, low copper (0.6% Cu) aluminum alloy with vertical and horizontal flexible ribs covering the full hemisphere. Ribs are minimum 1/4\" depth and 3/16\" thickness. Secured to housing with four stainless steel captive socket head screws.
Half Face: Solid upper half.
Lens: Molded and heat treated glass, 3/4\" minimum thickness with internal sandblast. Fastened in face plate and sealed with a one-piece silicone gasket. Choice of anodized (8) or internal plating (P).

Socket: (HID): Porcelain medium base socket rated 4KV. (Fluorescent): Plastic G24q3/G24q4 base socket. No socket for LED.

Ballast: All components mounted on plate with quick disconnect plug. (HID): VXX-Restor - High power factor with starting temperatures of -40°F; for PPS and -20°F; for PPH lamp modes. (Fluorescent): Encapsulated with thermal cutoff. Electronic with multi-voltage (108v to 305v) input, 50/60 HZ. High power factor with starting temperatures of -20°F.

LED Optical System: A total of 9 LED emitters configured in a rectangular array comprised together as a module. Two (2) modules for 30W version. Available in 'Halogen White' (approx. 3500K). Emitters are directly attached to the electronic driver.

LED Driver: 1 or 2 constant current electronic (drivers). Rated for 15 watts typical 15W@900m, 30W@1600m. Available in 120V or 277V input, -40°F, starting temperature. All drivers are Underwriters Laboratories recognized.

Finish: Super TGIC thermoset polyester powder coat paint, 2.5 mil nominal thickness, applied over a titanium zirconium conversion coating, 2500 hour salt spray test endurance rating. Standard colors are Black, Dark Bronze, Light Gray, Stainless Gray, Platinum Silver, or White. Custom colors are available.

Power Items: Recessed housings devoid of all electrical components. Protective presswood niche covers are supplied to temporarily seal the open housings until the electrical modules and face plates are ready to install. Quick disconnect plugs supplied for electrical modules. For recessed hollow wall configurations, insulation detectors supplied in place of one conduit tap for HID. No insulation is permitted above the housing or within 3' of sides and bottom. Detectors will cut power if distance oversteered due to insulation.

Finishing Items: Electrical modules and face plates. Each set of finishing items will be in one container, clearly marked with the fixture catalog number.

CAUTION: Fixtures must be grounded in accordance with national, state, and/or local electrical codes. Failure to do so may result in serious personal injury.

Listings and Ratings

UL cUL 159® IP66 Rated CE 25C Ambient

*Suitable for wet locations

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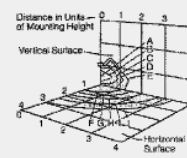
Wall Forms - Round

Photometrics - 70 Watt Pulse Start Metal Halide

ED-17 coated medium base
4,800 Initial Lumens

WF21
WF31
Half Face

I.T.L. Test No. 43125



Initial Footcandle at Listed PMH				
	7'	8'	9'	10'
A	3.00	0.53	0.37	0.27
B	1.50	0.27	0.19	0.13
C	0.75	0.13	0.11	0.08
D	0.38	0.06	0.03	0.02
E	0.15	0.10	0.07	0.05
F	2.80	2.00	1.60	1.30
G	1.20	1.00	0.75	0.64
H	0.55	0.50	0.40	0.32
I	0.25	0.20	0.16	0.13
J	0.13	0.10	0.08	0.06

LIGHTING

FIXTURE TYPE: WF31H by WALL FORMS
Half Face Recessed Mount, Round
with 'Half Face' Plate

LENS TYPE: Prisms

ELECTRICAL MODULE: 70MH120
- Pulse Start Metal Halide
- Lamp wattage to be 70 watts with
120 Line Volts

FINISH: White
(Super TGIC powder coat paint over a
titanated zirconium conversion coating).

FUSING: Single Fusing for 120 V

LOCATION: The Fixture Location Plan above indicates the
location of wall mounted fixtures in plan.

HEIGHT: The proposed fixtures to be approximately
8 feet above grade.

SYMBOL ON PLAN:
(where LF indicates
the location of
light fixture)

LIGHT DISTRIBUTION CHARACTERISTICS for WF31H fixture

The above Fixture Location Plan shows the light distribution characteristics of a wall mounted 70 watt pulse start metal halide lamps placed at 8 feet above ground. The dotted line on the Light Fixture Location Plan Detail indicates the extent where the photometric characteristics are 0.1 footcandles.

PHOT

Photometry
by: Devin

LIGHT METE

SITE CONDI

Petitioner's landscape architect, Surina Singh, testified that the landscape and lighting plan is consistent with the requirements of the Zoning Ordinance. Tr. 71-87. It proposes shade trees and evergreen trees around the perimeter that would act as a visual buffer, and consideration was given to views from outside, filling gaps between existing trees and voids that would be created with trees that would be removed due to the construction. In Ms. Singh's opinion, the proposed structure will be well-related to the surrounding area in its landscaping. The strategic location of the proposed building within the site, coupled with the landscape buffering and the screening, would help the building blend well and relate to its surroundings. The proposed structure will have suitable landscaping and screening, consisting of plantings and fencing.

Technical Staff recommended additional shrubs as a buffer between the outdoor patio and the stormwater management area southeast of the building (Exhibit 16, p. 2). This recommendation was implemented, and the revised landscape and lighting plan now reflects these improvements.⁶ The revised Landscape and Lighting Plan (Exhibit 33(g)) also added additional photometric data requested by the Hearing Examiner at the hearing, and the revised plan was approved by Technical Staff before the record closed (Exhibit 35(a)).

There are existing pole lights in the front of the existing building, and in the back of the existing building, there are wall-mounted fixtures. The new lighting proposed in this plan is 14 wall sconces all around the perimeter of the proposed addition. There would not be any additional freestanding lights proposed as part of this plan. The lighting analysis of the photometric characteristics indicate that the lighting levels will be 0.1 footcandles or less, a few feet away from the proposed addition, and the light will be much less than that at the property line. These wall-

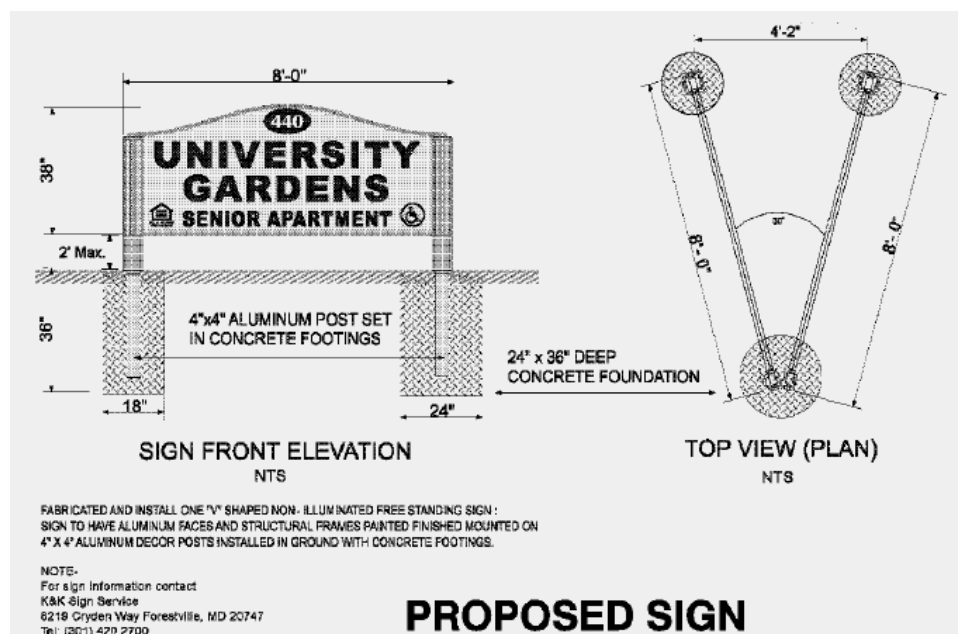
⁶ Technical Staff had also originally recommended additional plantings between the existing parking lot and University Boulevard. Petitioners responded to Technical Staff that there was an existing berm and sufficient trees and shrub plantings in this area, and Staff concurred, as confirmed by an e-mail of February 18, 2010, from Robert Kronenberg (Exhibit 29).

mounted fixtures will be full cut-off, and according to Ms. Singh, the proposed light fixtures would not contribute any glare or trespass at the adjoining property line. Tr. 79-80.

The Hearing Examiner notes that there are a few photometric readings on the northern side lot line (close to the parking lot in front of the existing building) that exceed the 0.1 footcandle limit established for residential zones in Zoning Ordinance §59-G-1.23(h); however, as mentioned in Part I of this report, special exceptions for senior housing have a grandfathering provision (Section 59-G-2.35 (h)(1)), which allows existing conditions to remain, and applies the new standards only to the modifications. It is clear from this record that the light exceedances in question will not result from new lighting to be added in this modification. The planned wall sconces on the new addition will be shielded and will throw little light. They certainly will not be the source of glare or light spillage at the northern property line. The Hearing Examiner therefore accepts Petitioners' evidence and Technical Staff's finding that the photometrics of this site will comply with the Zoning Ordinance.

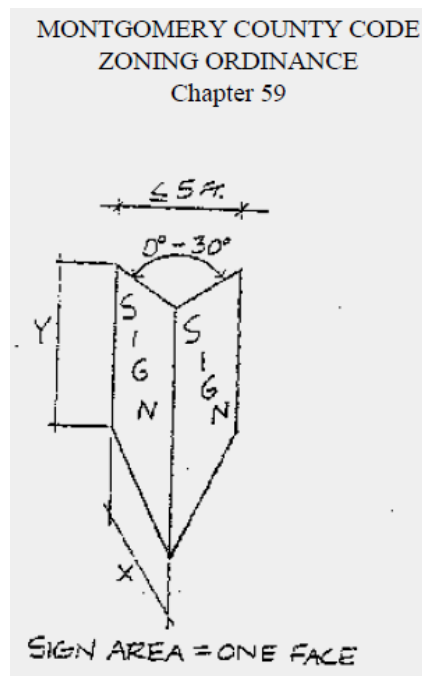
Signage:

Petitioners are proposing a new V-shaped sign that would replace the existing sign in front of the existing building, facing University Boulevard. It would be a non-illuminated, freestanding sign, the details of which are indicated on the revised Landscape and Lighting Plan (Exhibit 33(g)):



The new sign is required by HUD because the old sign appeared to restrict occupancy to Koreans, and under fair housing rules, the facility must be open to all financially eligible seniors. Tr. 139-140. The Department of Permitting Services (DPS) will have to issue a permit for the sign, but the fact that it will be a V-shaped sign will provide better visibility for traffic moving both northbound and southbound on University Boulevard. Tr. 84-85.

Ms. Singh testified that the new sign will conform to all the requirements of Article 59-F of the Zoning Ordinance. Tr. 84. Under §59-F-4.2(a)(3), an entrance sign to a multi-family development may have a sign area of up to 40 square feet. Because the faces of the sign are only 30 degrees apart, the sign area of a V-shaped sign is calculated as the area of one face, not the sum of both, as shown in Figure 5 from the “Sign Figures” section Zoning Ordinance Article §59-F:



As a result, the total area of the sign will be less than the 40 square feet permitted for an entrance sign under §59-F-4.2(a)(3). Technical Staff approved the proposed sign in its supplemental report (Exhibit 35), and a sign permit from DPS will have to be filed with the Board of Appeals prior to posting of the sign.

Operations:

The facility is housing for senior adults and those with disabilities, but it is not a nursing home or an assisted living facility.⁷ It thus will operate like any other multi-family residential facility. Tr. 134. As a residential building, University Gardens is “in operation” 24 hours of the day. Its business hours are 8:00 a.m. to 5:00 p.m. Tr. 132-133.

The average age of the residents at University Gardens is 77.6 years. The occupancy of the 27-unit addition will be restricted to senior adults, their spouses and/or caregivers, disabled persons and an onsite manager. University Gardens currently has four staff members. There is a housing manager who is in charge of the day-to-day operations of the facility, and an assistant housing manager. They take care of the administrative procedures of the management operations, and there are two maintenance technicians, one for repair services and the other for custodial and grounds. No new employees are being proposed as part of the requested special exception modification because the additional 27 units will not make a significant impact on the maintenance operations and management’s ability to serve the residents. The current staffing is what is ordinarily used for 100-unit facilities. Tr. 127-128.

The resolution originally granting this special exception in 1987 mentioned a shuttle bus to be run by the facility (page 8 of the BOA Resolution, effective 7/28/87, attached to Exhibit 11), although it was not made a condition of the special exception. Petitioners’ counsel indicates that there has never been a need for a shuttle bus run by the facility, and a shuttle bus has never been provided. Tr. 12. Ample evidence was introduced to establish that the facility has operated effectively since the original approval without a shuttle bus service because multiple modes of transportation and other services, both public and private, are available to the residents. Tr. 137-138.

⁷ It is for this reason that Technical Staff withdrew its recommendation for a condition specifying hours for deliveries of food and medical supplies. There are no such deliveries organized by the facility. Tr. 134 and Exhibit 35.

Petitioners land planner, John Sekerak, prepared an exhibit identifying the major thoroughfares, public transportation routes and the location of commercial, medical and public services within a one mile radius of the subject property (Exhibit 13(c)).

As summarized by Technical Staff (Exhibit 16, pp. 4-5):

[L]ocal facilities and organizations provide shuttles that pick up and drop off residents of the facility at the property. There are three different local adult day care centers that pick-up residents and take them to nearby adult day care centers during the day. The shuttle pick-up occurs between 7 a.m. – 7:30 a.m. and residents are dropped off between 1:45 p.m. – 2:30 p.m. Services provided at the adult day care centers include a pharmacy, meals, a nurse practitioner, social worker and senior social activities. A local Korean grocery store also shuttles residents weekly between the facility and the grocery store. Additionally, local churches shuttle residents to and from Sunday church services.

Staff agreed with Petitioners “that requiring an on-site shuttle bus service for the residents of the facility is not necessary, since adequate transportation services exist to serve the special exception, as modified.” *Id.* There is no evidence to the contrary, and the Hearing Examiner therefore recommends a condition in Part V of this report to clarify that the Board does not require this facility to run its own shuttle bus.

D. Public Facilities (Water, Sewer, Traffic and Parking)

The requested special exception modification does not require approval of a preliminary plan of subdivision because, when the special exception was approved, the property was recorded as a single lot. Although a portion of the lot was subsequently conveyed to the adjoining property owner to the south, §50-9(d) of the subdivision regulations allows for up to 2,000 square feet of conveyance to adjoining properties without additional subdivision or platting. Thus, the lot is exempt from further subdivision and platting requirements, and building permits may be issued. This conclusion was confirmed by a letter from Technical Staff (Exhibit 24). Tr. 53-57.

There is one other complication – there is an existing adequate public facilities (APF) agreement which limits development on the site to 65 units. It was executed by Petitioners and the Planning Board at the time of the initial special exception and approval of the preliminary plan of subdivision. Technical Staff determined that the best vehicle for having that agreement rescinded would be a minor preliminary plan amendment. That amendment would be a consent item with the Planning Board, and it would not have an APF component to it; rather, it would simply have the Planning Board rescind the APF agreement. Thus, the preliminary plan will remain, but it will not have an APF component. According to Mr. Sekerak, preliminary plans do not have APF agreements anymore, so the existing one will not need to be replaced; it would just be extinguished. Petitioners' attorney asked that the Board of Appeals impose a condition stating that the current APF agreement must either be modified or extinguished to allow for the additional 27 units (Tr. 55), and the Hearing Examiner has recommended such a condition in Part V of this report.

Because subdivision will not be required in this case, the Board of Appeals must determine the adequacy of the public facilities. Public school capacity is not an issue in this case because the nature of the special exception (senior housing) would preclude demand for school facilities. The proposed addition would also be served by adequate public facilities including water, sewer, schools, police and fire protection, public roads and other facilities. Police facilities are nearby both to the north and south of the property. The nearest fire station is roughly a mile to the north right on University Boulevard, so there is very direct access. Because of the existing use, there are adequate existing water and sewer facilities, and it is in category 1 for both water and sewer (*i.e.*, the service is already available on the site). Tr. 52. Technical Staff agrees (Exhibit 16, p. 11):

A preliminary plan of subdivision is not required. The subject site is adequately served by public facilities. The property is adequately served by public water and sanitary sewer service operated by the Washington Suburban Sanitary Commission (WSSC).

Traffic:

Petitioner's land planner submitted a traffic statement (Exhibit 11) to M-NCPPC's transportation planning staff, opining that local area transportation review (LATR) and policy area mobility review (PAMR) would be satisfied without a formal traffic study due to the small amount of additional trips projected from the proposed addition, pursuant to the LATR and PAMR Guidelines.

The subject site is in the Silver Spring/Takoma Park transportation policy area. According to Mr. Sekerak, Table A-7 of the Appendix to the guidelines provides recommended trip generation rates for this type of use. For those that are under 150 units, it lists 0.05 trips in the a.m. and 0.04 trips in the p.m., as the applicable per unit trips generated during the peak hours. For the 27 proposed new units, that effectively adds just one new trip to the road network during each peak hour. Because the use will generate no more than three additional morning and evening peak hour trips, it satisfies LATR and PAMR without a formal traffic study. Tr. 44-45.

Technical Staff reviewed Mr. Sekerak's findings and agreed with them. As stated by Staff (Exhibit 16, pp. 6-7):

A traffic study is not required for the subject special exception petition since the additional units proposed at the existing elderly housing facility will not generate 30 or more peak-hour trips during the typical weekday morning (6:30 a.m. – 9:30 a.m.) and evening (4:00 p.m. – 7:00 p.m.) peak periods. With documentation of site trip generation as above, the proposed use satisfies the LATR requirements of the APF test. . . .

To satisfy the PAMR requirements of the APF test, a use located within the Silver Spring/Takoma Park Policy Area is required to mitigate 10% of its "new" peak-hour trips. However, the proposed addition is exempt from PAMR requirement since the use is estimated to generate less than four weekday peak-hour trips.

The Hearing examiner reached the same conclusion, but traveled a different route to get there. Table A-7 of the 2008 LATR/PAMR Guidelines provides the following:

Table A-7
Senior/Elderly Housing

Type of Facility	Formula/Rate
Retirement Community with active seniors and minimal support services	Use ITE Land Use Code 250
Independent-Living Facilities with some support services plus minimal assisted-living and nursing home facilities	<p><u>Formula</u></p> <p>Up to 150 units: AM: T = 0.05 (U) PM: T = 0.04 (U)</p> <p>Over 150* units: AM: T = 0.08 (U) PM: T = 0.11 (U)</p>

Both Mr. Sekerak and Technical Staff applied the formula below the line, which is designed for “Independent-Living Facilities with some support services plus minimal assisted-living and nursing home facilities.” The evidence presented by Petitioners in this case was that it does not, as a facility, provide any services. Essentially, it will operate like any other multi-family residential facility. Tr. 134. Therefore, the better formula to apply is, presumably, the one above the line for a “Retirement community with active seniors and minimal support services.” For that, Table A-7 refers the reader to “ITE [Institute of Transportation Engineers] Land Use Code 250.”

The Hearing Examiner reviewed the ITE Trip Generation Report, 8th Edition, and found that it had no category “Land Use 250,” but it did have a category “Land Use 252” for “Senior Adult Housing – Attached,” which seemed to be close to this situation. For sites with an average number of 177 dwelling units (the lowest number listed), the a.m. peak-hour trip generation rate was 0.6 trips per dwelling unit. The p.m. peak-hour trip generation rate was .11 trips per dwelling unit.

Applying these rates to the 27 new units yields a trip generation of 1.62 a.m. peak-hour trips and 2.97 p.m. peak-hour trips. Both of these numbers, while higher than the numbers suggested by Petitioners and Technical Staff, are still below the thresholds of LATR and PAMR.⁸ Thus, the

⁸ The Hearing Examiner takes official notice of the ITE Trip Generation Report, 8th Edition. Had the numbers generated by reference to that source been above the thresholds, the Hearing Examiner would have reopened the record and given

Hearing Examiner must conclude that both LATR and PAMR have been satisfied. The concern raised by the one community witness, Linda Holleran, about the danger of u-turns to access the facility, will be discussed in Part II. F. of this report.

Parking:

The parking facility will not be expanded, but it will be re-striped to improve the layout and to denote the dimensions of the ADA spaces and where they are located. No pavement will be added, and the number of parking spaces will remain at 37. Even though new units are being added, the existing spaces will be sufficient because the number of spaces meets the code requirements. Moreover, through many observations, Mr. Sekerak observed that there are always many spaces available on the parking lot. Generally, 20 spaces is about the maximum ever used, and he therefore expects that the 37 spaces will be more than enough for the 27-unit addition. The average age of the residents is in the 70s and they are very low-income, so car ownership is less than what you would typically see in a senior housing facility. Tr. 39-41.

Base parking requirements for the proposed facility are determined by Zoning Ordinance §59-E-3.7, which specifies different parking standards for different policy areas and different numbers of bedrooms per unit. Technical Staff indicates that for the subject site (which is in the “Southern Area” as designated by the Council’s 1984 specifications), the Petitioner must provide 0.50 parking spaces for each one-bedroom apartment and 0.65 spaces for each two-bedroom apartment per unit. Exhibit 16, pp. 12-13. Thus, the base requirement for the planned 92-unit facility would be 47 parking spaces $[(91 \text{ one-bedroom units} \times 0.5) + (1 \text{ two-bedroom unit} \times 0.65) = 46.15 \text{ spaces}]$. Section 59-E-3.7 modifies this requirement with the statement, “The base requirement may be reduced in accordance with the credit provisions of Section 59-E- 3.33.” Section 59-B-3.33 (b)(3) of the Zoning Ordinance

the parties the opportunity to comment. This step is unnecessary because resort to the ITE rates made no difference in the outcome of the transportation analysis.

allows a 20% credit for the MPDUs, which reduces the parking requirement by 10 spaces, down to 37. Technical Staff therefore concludes, “. . . the subject application, with a current supply of 37 parking spaces, satisfies the parking requirement.” Exhibit 16, pp. 12-13.

E. Environmental Impacts

A Natural Resources Inventory/Forest Stand Delineation (NRI/FSD #420100240) was approved on September 3, 2009. Exhibit 7(c). According to Technical Staff, “There are no streams, wetlands, and floodplain on-site. This property is not located within a Special Protection Area.” Exhibit 16, Attachment 8, p. 2.

Forest Conservation:

The property is subject to the Montgomery County Forest Conservation Law, and the Planning Board gave final approval of the revised Preliminary Forest Conservation Plan (PFCP, Exhibits 39(a) and (b)) on March 26, 2010. Exhibit 39(c). There are two trees on or near the subject property greater than 30 inches in diameter. A very recent state regulation, which has been implemented into local regulations, requires a tree “variance” before removal of a specimen tree.⁹ The Planning Board did approve those variances along with the preliminary forest conservation plan. Tr. 61. Since one of those trees is just off of the subject property, Petitioners also obtained the approval of the adjoining property owners to remove their trees. Exhibit 39(d).

Stormwater Management:

All of the stormwater runoff currently exits the site at the northeast corner through the existing storm drain system. The proposed stormwater management system covers not only the existing building but also provides storm management for the addition and the existing parking. It

⁹ The specimen tree variance has nothing to do with a Board of Appeals variance; rather it is a variance that has to be requested through the County arborist, with approval of the Planning Board. Montgomery County Code, Chapter

will be a landscaped infiltration area in the southeast corner of the site that will take the water through grass channels over land into this infiltration area. Any flow in excess of the design flow would then go through a control structure and out through the existing storm drain system in the north of the property. According to Petitioners' engineer, Kimberly Currano, the proposed stormwater management facility will improve the existing stormwater management, and it will comply with the State regulations that went into effect May 4, 2010. Tr. 67-69.

As stated by Technical Staff (Exhibit 16, p. 7),

The stormwater management concept consists of construction of a landscaped infiltration area and a grassed swale to meet the full Environmental Site Design (ESD) requirements for the new construction and provide control for the existing parking lot. A portion of the existing building will continue to drain to the existing infiltration structure via roof down spout connections.

The stormwater management concept plan (Exhibit 10(b)) was approved by the Department of Permitting Services on August 27, 2009. Exhibit 10(a).

Based on this record, the Hearing Examiner finds that there are no environmental issues warranting denial of the subject petition.

F. Community Concerns

As mentioned in Part I of this report, there were no letters of opposition to this petition prior to the hearing. Staff also had not received any oral or written comments in opposition to the proposed special exception. Exhibit 16, p. 7. At the hearing, Linda Holleran, testified on her own behalf and as President of the Buckingham Terrace Homeowners Association (BTHOA). Tr. 15-20.

She stated that BTHOA had three concerns (*i.e.*, construction noise, traffic and wandering elderly residents), but "We don't have a general objection to them making the addition. . . ." Tr. 15. However, after the hearing, Ms. Holleran filed comments (Exhibit 40(a)) attacking the density, scale

22A-21, requires that a variance be granted by the Planning Board before the Petitioners may remove specimen trees located inside the special exception area.

and design of the proposed addition and raising other concerns.

We do not believe that the new building proposed to be constructed under the Revised Plan (the “Proposed Modification”) will be in harmony with the general character of the neighborhood, considering the density of the proposed number of residents, the scale and design of the new structure, and traffic and parking conditions. As such, we believe that the proposed modification will have significant adverse effects on the peaceful enjoyment and economic value of the nearby properties located on Gloucester Knoll Drive. We believe that these adverse effects are not due to the inherent nature of the Special Exception, but are due principally to the size and scale of the Proposed Modification.

The Hearing Examiner agrees with Ms. Holleran that an addition of this size should be scrutinized for its impact on the neighborhood, but that is what the duly noticed hearing was all about. As specified in the notice of hearing (Exhibit 14(b)), the file, which includes all the plans, was available to the public for inspection well prior to the hearing, so BTHOA cannot claim that it never had access to the full plans. The appropriate time to raise many of the issues she now raises was at the hearing. Nevertheless, this report addresses most of the concerns raised for the first time after the hearing.¹⁰

Compatibility:

Ms. Holleran’s letter mischaracterizes University Gardens as “a large commercial building in the midst of a residential area.” Exhibit 40(a), p. 2. In fact, it is a multifamily, residential building, not a commercial building. Scott Knudson, Petitioners’ expert in architecture, testified that the proposed addition will be compatible and in harmony with the general character of the neighborhood considering the design, scale, height, bulk, materials and textures. It will be slightly lower than, and not as long as, the existing apartment building. It also steps down at the rear as it approaches the

¹⁰ Ms. Holleran is especially late in raising concerns about the Preliminary Forest Conservation Plan. That plan was initially approved conditionally by the Planning Board at its February 18, 2010 meeting, and it was finally approved by the Planning Board on March 26, 2010, after Petitioners met the Planning Board’s conditions. Exhibit 39(c). Similarly, Petitioners’ landscape and lighting plans underwent a number of revisions before Technical Staff recommended their approval. Exhibit 35(a). It would be fundamentally unfair to the Petitioners to “remand” these matters for further hearings to resolve issues which the community had every opportunity to raise at the hearing and failed to do. Contrary to Ms. Holleran’s assertion (Exhibit 40(a), p. 5), no new lights will be added to the parking lot. Tr. 79-80.

adjacent single-family homes, and the building will be sited to take advantage of the topography to reduce its apparent scale. It will have a residential appearance throughout, and will look very much like most residential multi-family buildings in the County. Tr. 88-111.

There is no contrary expert evidence in the record. Technical Staff agreed with Mr. Knudson, finding that the siting and orientation of the proposed building will “minimize the appearance of bulk and mass as it appears from the nearest residential homes.” Exhibit 16, p. 13. Most importantly, the Board of Appeals already found, in its 1987 grant of the special exception, that “this portion of University Boulevard contains ‘mixed uses’, both in size, bulk and use, thus the proposed [now existing] building will not be incompatible with the neighborhood.” Board Opinion, p. 8. As noted by Petitioners’ attorney, in response to Ms. Holleran’s letter, the University Gardens facility predates the development of the townhouse community in which she lives. The addition will also be 170 feet away from the townhouses to the north, which will significantly reduce its impact. Moreover, the green area proposed for this site (an item complained about in Ms. Holleran’s letter) is 64%, which far exceeds the 50% green area required by Zoning Ordinance §59-G-2.35(c)(4).

Given this record, the Hearing Examiner finds Ms. Holleran’s objections regarding compatibility to be unpersuasive.

Traffic and Parking:

The impact on traffic and parking were addressed at length in Part II. D. of this report. Whether one applies the LATR and PAMR Guidelines or the ITE Trip Generation Report standards, the additional number of trips generated by this addition will be very small, and therefore cannot be said to burden the neighborhood with added congestion. Ms. Holleran noted at the hearing that one cannot make a left turn directly into University Gardens, and people make a U-turn at Buckingham Drive, which has a traffic light but no turn signal, in order to be able to turn into University Gardens

or onto Gloucester Knoll Drive. She would therefore like to have a turn signal placed at the intersection of University Boulevard and Buckingham Drive. Whether or not that is a viable idea is something for the state transportation authorities to consider, because University Boulevard (MD Rt. 193) is a state road. There is no expert evidence in this record establishing that the intersection in question is in an unsafe condition.

As to parking, the evidence in this record is that the number of parking spaces already provided on site (37) meets the requirements of the Zoning Ordinance and, as a practical matter, will be sufficient to handle the increase in residential units. *See discussion on pp. 30-31 of this report.*

Residents wandering off:

Another item raised by Ms. Holleran at the hearing and in her letter concerns the fact that Petitioners were not planning on adding additional employees “to care for or supervise the 27 additional residents.” Exhibit 40(a), pp. 2-3. Ms. Holleran indicated at the hearing that there have been “issues with some of their residents wandering over to our units and ringing the doorbells even at late hours and so we would hope that there would be some additional supervision or something.” Tr. 19. On cross-examination, she indicated that it had only happened to her once.

The important fact, in response to the “wandering off” allegation, is that this building and its proposed addition will not be a nursing home or even an assisted living facility, but rather a residence for independent seniors, and Petitioners cannot be expected to prevent residents, who are free to come and go at will, from “wandering off” and ringing someone’s doorbell. The staff is not there to “care for or supervise” the residents. They are there essentially to manage and maintain the building. Tr. 25, 132-134.

Construction Noise:

Ms. Holleran’s primary concern at the hearing was about anticipated construction noise

generated by the addition being built. BTHOA consists of 11 townhouse units that run alongside the entire length of the University Gardens property, perpendicular to University Boulevard. Ms. Holleran testified as to her understanding that construction will start at 7:00 a.m. each day. This is a residential area on both sides, and she believes that for residential areas, construction should not begin until 8:00 a.m. or after. She asked that construction not begin before 9:00 a.m. [Petitioners' counsel would not agree and indicated that the Montgomery County Code noise requirements permit construction to start in residential areas at 7:00 a.m.] Tr. 15-16.

Mr. Knudson, Petitioners' architect, described the construction process. The building materials will be concrete slab on the grade, and then the rest of the building will have wood framing. Mr. Knudson estimates a 12 to 14 month cycle for the total construction. During that cycle, the noise produced drops over time, so much of the loudest noise is the early stages of construction, specifically during excavation and any site work. Some of the utilities will be extended from the existing building, so there will be less digging and less work associated with that. The soil is relatively good, so he does not anticipate deep foundations or the need to drive piles or the like. He expects to use concrete footings. Tr. 106-107.

Mr. Knudson anticipates two to three or four months of site work with backhoes and concrete trucks backing in and the like. Then the process would move to framing things for another two to four months, and the primary noise associated with that would be nailing guns as they're putting up the walls and the plywood, and possibly some cranes that might come in to lift trusses. Once that's up, quieter trades, such as putting on siding or masonry take place, and then the work moves inside. At the very end of the job, there will probably be a some more site work to level out the grades and the like. Since no new parking lots or roads will be created, that whole area of noise creation will be avoided. Tr. 106-107.

Relative to Ms. Holleran's request to delay the start of construction on a daily basis, Mr. Knudson indicated that typical contractors will want to start very early, sometimes as early as 6 o'clock. As that is pushed later into the day, it starts to affect the cost of construction and it also can affect the schedule. The more the working hours are restricted, the more costs will be driven up and the schedule extended. This facility is subsidized through HUD funding. Typically, the crews do not work Saturday and Sunday unless they are making up time. According to Mr. Knudson, it's good to have that flexibility to shorten the construction cycle and control costs for the affordable housing. The contractor is bound by decibel levels at the property line.

The Hearing Examiner inquired as to whether it might be appropriate to erect some kind of a noise barrier during construction. Tr. 110-111. Mr. Knudson did not know what the acoustical impact of a temporary wooden fence on the intervening hill might be. He also could not think of any other steps that could be taken, aside from restrictions on hours and days, that can reduce the level of construction noise during construction. Tr. 107-111. He did note, however, that the addition will be built in the area where the grade is about 10 feet lower than on that hill, and that will help with noise issues because the noise of the work will hit the hill surface and will be partially absorbed and reflected. Four of the townhouses to the north have a clear line of sight over the fence to the proposed addition. The other seven townhouses are actually north of the existing building and north of the parking lot, and they will be less impacted visually or audibly. Tr. 100-101.

Mr. Sekerak testified that although he is not a noise expert, he is familiar with the attributes of noise attenuation. Plantings and typical fencing provide very little noise attenuation. Acoustical fencing is expensive. To do something that would really be effective, it would need to be tongue-and-groove, sandwiched with insulation, in order to really be considered noise attenuation. The truly effective ways of noise mitigation are distance and intervening structures, like the building itself.

The construction traffic would be buffered by the proposed building itself. The proposed 27-unit addition is 170 feet away from the existing townhomes. That is the primary and most effective noise mitigation treatment – the sheer distance. The berm also provides noise attenuation for work on the ground. To try to mitigate noise as to construction on the upper levels, the fence would have to be acoustical in its design and extremely tall. Tr. 115-117.

At the suggestion of the People's Counsel, Petitioners asked Technical Staff to opine regarding the construction noise issue, and the result was a recommended condition requiring Petitioners to comply with County noise (and other) regulations. Exhibit 35. Section 31B-6 of the County Code addresses limits on noise during construction. It provides:

- (a) *Maximum allowable noise levels for construction.*
 - (1) *A person must not cause or permit noise levels from construction activity that exceed the following levels:*
 - (A) *From 7 a.m. to 5 p.m. weekdays:*
 - (i) *75 dBA if the Department has not approved a noise-suppression plan for the activity; or*
 - (ii) *85 dBA if the Department has approved a noise-suppression plan for the activity.*
 - (B) *The level specified in Section 31B-5 at all other times.*
 - (2) *Construction noise levels must be measured at the location, at least 50 feet from the source, on a receiving property where noise from the source is greatest.*
 - (3) *The Department must by regulation establish requirements for noise-suppression plans and adopt procedures for evaluating and approving plans. The regulations must provide that, at least 10 days before approving a noise-suppression plan, the Director must provide public notice reasonably calculated to reach at least a majority of households that might be affected by the construction activity noise levels above 75 dBA.*
- (b) *Construction noise disturbance. The prohibition on noise disturbance in Section 31B- 5(b) applies to construction activities, notwithstanding subsection (a).*
- (c) *Examples. The following examples illustrate common construction noise-producing acts that violate this section if they exceed the noise level standards set in subsection (a) or create a noise disturbance. The examples are illustrative only and*

do not limit or expand the construction noise level or noise disturbance standards of this section:

- (1) Delivering materials or equipment, or loading or unloading during nighttime hours in a residential noise area.*
- (2) Operating construction equipment with audible back-up warning devices during nighttime hours. (1996 L.M.C., ch. 32, § 1.)*

While Code Section 31B-6 sets permitted noise levels for construction by hours, it does not preclude the Board of Appeals from exercising its authority under Zoning Ordinance §59-G-1.22(a) to set conditions for a special exception as necessary to protect nearby neighbors. That section provides:

(a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.

Given the proximity to the site of townhouses to the north, the single-family detached homes to the east, and especially the current residents of the existing senior housing facility, the Hearing Examiner believes it is advisable to restrict construction to not beginning before 8:00 a.m. on weekdays and 9:00 a.m. on weekends until the new building is enclosed. Although they live on the subject site, rather than adjacent to it, the elderly who currently live in University Gardens will be very close to the construction site, and this condition will ease their exposure to construction noise early in the morning. Based on this record, there is no basis for imposing a requirement for the construction of an additional fence to attenuate the noise. There is already a six-foot stockade fence on the property line, and the evidence is that an economically feasible, temporary noise fence would have little or no value in reducing noise impacts.

In sum, the concerns of neighbors have been addressed, but they do not warrant denial of this petition or a remand for further hearings. Overall, the provision of additional quality housing for low-income seniors is a highly desirable outcome for the community, and the proposal will be compatible with the neighborhood.

III. SUMMARY OF THE HEARING

The hearing took place on March 5, 2010, as scheduled. Petitioner called six witnesses, John Sekerak, land planner and landscape architect; Kimberly Currano, civil engineer; Surina Singh, landscape architect; Scott Knudson, architect; Dwight Mayes, Director of Housing for NCBA Housing Management Corp; and Theodore Ungchang Kim, President and Chairman of the Board of both Petitioners.

One member of the community, Linda Holleran, testified on her own behalf and as President of the Buckingham Terrace Homeowners Association (BTHOA). Although BTHOA did not file a statement 10 days before the hearing, as required by Zoning Ordinance §59-A-4.49, Petitioners' attorney, Casey Moore, Esquire, waived any objection. Tr. 11-12.

Martin Klauber, the People's Counsel, did not call any witnesses, but he participated in the hearing and supported the petition. Tr. 148.

A. Petitioner's Case

1. John Sekerak, Jr. (Tr. 21-63;112-117):

John Sekerak, Jr. testified as an expert in land planning and landscape architecture. Mr. Sekerak described the 2.08 acre property. It is improved with existing four-story housing for the elderly, a multi-unit building facing University Boulevard. It has a 37 space parking facility at the front of the building and a single driveway entrance onto University Boulevard.

The NRI/FSD (Exhibit 7(c)) shows the topographic characteristics of the property, a berm along the frontage of University Boulevard, and the grades descend as one goes eastward towards the rear of the property. So, lower portions of the property are to the east. The NRI also shows locations of other improvements such as fences around much of the perimeter of the property, a variety of fencing styles, the existing vegetation on there, primarily landscape materials put in at the

time of the initial construction back in 1991, and the open areas to the rear of the property with both lawn area and a resident gardening area.

[In answer to a question from the Hearing Examiner, Petitioners' attorney indicated that this is a multi-family building for senior residents, and residents do not have to get permission to leave. They could leave at any time they want. Tr. 25-26.]

Mr. Sekerak introduced an illustrative landscape plan of the site (Exhibit 22) showing that the proposed 27-unit addition will be located to the rear of the existing facility in a "T" type of pattern. It shows existing and proposed plant materials regarding the elements of the modification, and the primary component is the 27-unit addition. There are some other minor components to the modification, an 80 square foot area to the front of the building where there is already an existing covering, will be enclosed for the convenience of the residents and the conservation of heating and cooling. There's an existing shed located just behind the back face of the existing building with the new construction. That, as an accessory structure, and it will be moved back further to the rear of the property, in conformance with the Zoning Ordinance requirements. Also, a new V-shaped sign is proposed along the frontage of University Boulevard, which will replace the existing sign at virtually the same location. A sign permit from DPS will be required. Mr. Sekerak also introduced a draft site plan (Exhibit 23).

Mr. Sekerak further testified that the proposed addition is consistent with the East Silver Spring Master Plan. There are no specific references to this site in the text, but it is identified on many of the master plan maps and is referred to as "elevator apartments." It does include recommendations for retaining the R-60 Zone, and this use is permitted by special exception in that zone. The text is replete with references to protecting the existing residential neighborhoods assuring that any development, redevelopment and special exception use should be compatible with

the residential character of the neighborhood. Mr. Sekerak considers the proposed addition to be a modest addition to existing housing for the elderly.

He introduced a Neighborhood Delineation and Zoning Map (Exhibit 21), on which he outlined what he considers the applicable neighborhood in green. It shows that East University Boulevard, being a six-lane highway, is a significant delineator of the neighborhood. However, he did include those residences directly confronting, in the block directly confronting the subject property. Even though they may not have direct view of the 27-unit addition, they have direct visual relationship to the subject property. The other extension of the neighborhood would be to include the place of worship just a couple properties to the north of the subject property, as well as those residences to the rear of the property (*i.e.*, to the east) that may have a direct visual connection to the property. However, that's where the limitation is because there is no direct vehicular pedestrian interaction between properties to the rear of the property or the subject property. And then to the south, those residences along Buckingham Drive and East University Boulevard down to a location where there is a townhouse development.

The zones within the neighborhood are all R-60, with the exception of the RT-15 townhome properties directly abutting the site to the north. Mr. Sekerak's definition of the general neighborhood is much smaller than Technical Staff's. In Mr. Sekerak's opinion, Staff's definition includes properties that have no practical relationship to the subject property even if it were new development, much less in considering the limited nature of the modification.

The subject property includes another special exception. There was a telecommunications antennae put on the roof of the subject property, which will remain unaffected by this application. In reviewing the records for that, they considered the applicable neighborhood for that because of the nature of the use, as being only a 200 foot radius. Directly to the south of the property, there's a

non-resident medical practitioner office in the property at the intersection of University Boulevard and Buckingham Drive, and then an accessory apartment special exception directly across University Boulevard.

In Mr. Sekerak's opinion, the special exception modification will not increase the number, density or scope of those special exception uses in a way that's inconsistent with the applicable master plan or that will adversely affect the residential nature of the area. It does not add any additional special exception use.

According to Mr. Sekerak, the addition will meet or exceed all the applicable development standards. The existing building will not be required to be brought into compliance with the current development standards because there are grandfathering provisions, §59-G-2.35(h)(1), that allow this to continue in its existing state. Those that were built and constructed in conformance with the 1987 standards can remain as is. For instance, the setback is now 25 feet to the side property line, while the existing building is only set back 22 feet, and is allowed to remain; all the components of the requested modification meet the contemporary standards.

The proposed four stories will be in conformity with the general character of the neighborhood, considering the design, scale, bulk and proposed building traffic and parking conditions. The back of the existing building actually has five stories exposed, and the four story addition will be oriented in such a way that the narrow end of it is oriented towards the nearest residences, to minimize the appearance of height and bulk. It's also at the lower portion of the site. So considering the nature of the existing building and the well-designed addition, it's very compatible with the existing neighborhood, in Mr. Sekerak's opinion.

The parking facility will not be expanded, but it will be re-striped to improve the layout and to denote the dimensions of the ADA spaces and where they're located. But no pavement will be

added. There are 37 spaces there now, and there will remain 37 spaces. Even though new units are being added, the existing spaces will be sufficient because the number of spaces meets the requirement for the number of units with the bedroom mix that is existing and proposed, and through many observations, he observed that there are always a lot of spaces available. Generally, 20 spaces is about the maximum number ever used, so he expects that the 37 spaces to be more than enough for the 27-unit addition. The average age of the residents is in the 70s and it is very low-income, so car ownership is less than what you would typically see in a senior housing facility.

According to Mr. Sekerak, § 59-E-2.83 of the Zoning Ordinance does not apply to the proposed special exception modification because those provisions specifically state an existing parking facility included as part of the special exception granted before May 6th, 2002 is a conforming use. This property was approved as a special exception in 1987; was constructed roughly in 1991; and began operating in 1992. That predated the 2002 deadline for that component, so it is allowed to continue as a conforming use.

Mr. Sekerak further testified that there is a sidewalk running along the entire frontage of the subject property along University Boulevard. It makes a connection to the other sidewalks within the area. There's an existing public bus stop right by the front driveway entrance to University Gardens, so that that sidewalk connection is very helpful there. That sidewalk also extends to the intersection of Buckingham Drive and University Boulevard, with another bus stop right across University Boulevard at that intersection. That intersection is fully signalized. There is a well-marked crosswalk and pedestrian cross signals, for the safety of the residents as they take advantage of the public transportation facilities. In Mr. Sekerak's opinion, there will be suitable pedestrian circulation for the subject property.

Mr. Sekerak prepared a traffic statement which was included in the land planning report back in 2008. It was prepared at a time when the 2008 LATR and PAMR guidelines were the applicable ones. Soon thereafter, 2009, amendments were approved, but as it applies to this case, there's really no distinction. The trip generation rates are the same in the most recently approved 2009 guidelines.

The subject site is in the Silver Spring/Takoma Park transportation policy area. The guidelines provide recommended trip generation rates for this type of use. For those that are under 150 units, it lists 0.05 trips in the a.m. and 0.04 trips in the p.m. as the applicable per unit trips generated during the peak hours. For the 27 proposed new units, that effectively adds just one new trip to the road network. Because the use will generate no more than three additional morning and evening peak hour trips, it satisfies LATR and PAMR without a formal traffic study.

In Mr. Sekerak's opinion, the proposed addition will be in harmony with the general character of the neighborhood considering population, density, design, scale and bulk, intensity and character of activity, traffic and parking conditions and number of similar uses. It is a modest expansion. It's located behind the existing building. It's already a rather eclectic neighborhood in terms of single-family detached, nonresidential medical office, townhomes in the RT-15 Zone, place of worship, and this will fit right into that diverse neighborhood and be a contributing element to that neighborhood. The proposed addition will not reduce the safety of vehicular or pedestrian traffic.

Responding to Ms. Holleran's concern, Mr. Sekerak testified that the state would have to approve a left turn signal on eastbound University Boulevard to ease access to the facility, but he noted that there are just a few existing peak hour trips generated now, and the new addition would generate only one new peak hour trip, of which only a fraction would be making the specified left-

hand turn. Mr. Sekerak made that turn into the site and had no difficulties, but would be willing to ask the state to consider a signal there.

In Mr. Sekerak's opinion, the proposed special exception modification would not result in any non-inherent adverse effects associated with the proposed use. The existing use and the proposed addition have the typical inherent effects of building, bulk and mass, concentration of older residents, parking facilities and dumpster facility. It has no identifiable adverse non-inherent effects. Further, the proposed addition will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties for the general neighborhood at the subject site irrespective of any adverse effects the use might have if established elsewhere in the zone. The addition is well-designed and properly buffered from the surrounding residential area, so it would not have those adverse effects. It also will not cause any objectionable noise, vibrations, fumes, odors, dust, illumination glare, or physical activity at the subject site. The nature of the use in terms of housing for the elderly, is very low impact for a well-designed facility. For instance, by putting HVAC units on the roof behind the parapet, noise would be distributed upwards and not towards the residents.

As to the construction noise issue raised by Ms. Holleran, Mr. Sekerak testified it would be similar to the inherent construction noise the current residents of University Gardens would have experienced during the construction of the townhouse units. That property was re-zoned after University Gardens was built to the RT-15, from the R-60 to the RT-15, and its construction had an impact on the University Gardens residents.

In terms of the construction time frame, there will be some noise impacts while they're doing the initial heavy work, but the majority of that time frame of construction, the building will

be enclosed and there's interior work being performed, so the window of construction noise is relatively small.

In Mr. Sekerak's opinion, the proposed addition would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area of the subject site. Their primary outdoor activity is gardening, a very residential type of activity, and this is a further contribution to the neighborhood and not detrimental. The proposed addition would also be served by adequate public facilities including water, sewer, schools, police and fire protection, public roads and other facilities. Police facilities are nearby both to the north and south of the property. The nearest fire station is roughly a mile to the north on University Boulevard, so there is very direct access. Because of the existing use, there are adequate, existing water and sewer facilities, and they are in category 1 for both water and sewer.

The requested special exception modification does not require approval of a preliminary plan of subdivision because when the special exception was approved, the property was recorded as a single lot. Although a portion of the lot was subsequently conveyed to the adjoining property to the south, §50-9(d) of the subdivision regulations allows for up to 2,000 square feet of conveyance to adjoining properties without additional subdivision or platting, so the lot is exempt from further subdivision and platting requirements and building permits may be issued. This was confirmed by a letter from Technical Staff (Exhibit 24). Tr. 53-57.

There is one other complication – with the initial special exception approval and the subsequent preliminary plan of subdivision approval, there was an adequate public facilities (APF) agreement executed by the applicant and property owner and the Planning Board. The problem is that the existing APF agreement between the property owner and the Planning Board limits development to 65 units. Technical Staff determined that the best vehicle for having that agreement

rescinded would be a minor preliminary plan amendment. That amendment would be a consent item with the Planning Board and it would not have an APF component to it. It would be simply to have the Planning Board rescind the APF agreement. So the preliminary plan will remain, but it will not have an APF component, since APF will be considered by the Board of Appeals.

Preliminary plans do not require APF agreements anymore, so one need not replace it. It would just be extinguished. [Petitioners' attorney asked that the Board of Appeals impose a condition stating that the current APF agreement must either be modified or extinguished to allow for the additional 27 units. Tr. 55.]

Mr. Sekerak prepared an exhibit identifying the major thoroughfares, public transportation routes and stops and the location of commercial medical and public services within a one mile radius of the subject property (Exhibit 13(c)). He also introduced the draft preliminary forest conservation plan, pages 1 and 2, as Exhibits 25(a) and (b). They were conditionally approved by the Planning Board, and the revised plans will be submitted to Technical Staff for approval. There is no existing forest on the subject property. There are two trees on or near the subject property greater than 30 inches in diameter. A very recent state regulation implemented into local regulations requires that any removal of a tree greater than 30 inches receive a variance. The Planning Board did approve those variances along with the preliminary forest conservation plan.

Mr. Sekerak added that this project is "a wonderful opportunity to add to the County's stock of affordable housing for senior residents. It's hard to imagine a more benign type where we could add 27 units to that stock where in an already developed area, complimenting existing use, no additional parking, no additional dumpsters, so little disruption." Tr. 63.

Mr. Sekerak further testified that the distance from that closest point (the rear stairwell) of the proposed addition to the closest point of the closest single-family house is almost 60 feet. It is

about 67 feet from the main part of the three story addition to the nearest home. There is an existing six-foot wood fence along that common property line. Above that are over-story canopy trees (Oaks which hang onto their leaves) for along the property line. In his opinion, additional screening would not be appropriate or necessary. Compatible uses, attractive uses, both providing six-foot dense at the ground level, lots of existing and proposed over-story that provides that visual mitigation for the full height of the building. Tr. 112-114.

As to noise attenuation during construction, Mr. Sekerak testified that although he is not a noise expert, he is fairly familiar with the attributes of it. Plantings and the typical fencing provide very little noise attenuation. Acoustical fencing is expensive. To do something that would really be effective, it would need to be tongue-and-groove sandwiched with insulation in order to really be considered noise attenuation. The truly effective ways of noise mitigation is A, distance and B, structural things like the building itself. The construction traffic would be buffered by the proposed building itself. The proposed 27-unit addition is 170 feet away from the existing townhomes. That is the primary and most effective noise mitigation treatment – the sheer distance. The berm also provides noise attenuation for work on the ground. To try to mitigate noise as to construction on the upper levels, the fence would have to be acoustical in its design and extremely tall.

[The People's Counsel suggested having Mr. Federline of Technical Staff opine about the practicality and efficiency of supplementing the berm.] Tr. 115-117.

2. Kimberly Currano, (Tr. 64-71):

Kimberly Currano testified as an expert in civil engineering. She described the storm water management concept plan prepared for the proposed 27-unit addition (Exhibit 10(b)). The existing building has some storm management already onsite. The water runoff comes from the University Boulevard area on the west towards the east side of the site. In the rear of the property is a water

quality inlet, also called an oil grit separator. There's also an existing infiltration trench that is in the rear of the property going the length of the building. That provides storm water management for all the existing impervious area. All of the runoff that is on the site exits the site at the northeast corner through existing storm drain system. The proposed storm water management covers not only the existing building but also provides storm management for the addition and the existing parking. It will be a landscaped infiltration area to be in the southeast corner of the site that will take the water through grass channels over land into this infiltration area, which will be a landscaped area that the water would infiltrate through and into the ground water. Any flow that would be in excess of the design flow would then go through a control structure and out through the existing storm drain system that's in the north of the property. The storm water management concept plan was approved by the Department of Permitting Services on August 27, 2009. Exhibit 10(a) is the approval letter.

The proposed storm water management facility will improve the existing storm water management, and it will comply with the regulations to go into effect May 4, 2010. To that end, Petitioners provided a lot more surface natural features to drain over land, which is more towards the new regulations to be implemented. Petitioners are not required to submit a water quality plan for the subject property because this property is not in a special protection area (SPA).

The subject property is currently served by public water and sewer service. The sewer comes from Buckingham Drive and the water is served at University Boulevard. The site is in water and sewer category 1, which provides adequate water and sewer services for the development with no problems.

3. Surina Singh, (Tr. 71-87):

Surina Singh testified as an expert in landscape architecture. She submitted a draft landscape and lighting plan as Exhibit No. 28, which will be submitted to Technical Staff for approval. The

landscape and lighting plan is consistent with the requirements of the Zoning Ordinance. It proposes shade trees and evergreen trees around the perimeter that would act as a visual buffer, and consideration was given to views from outside, filling gaps between existing trees and voids that would be created with trees that would be removed due to the construction.

Technical Staff had two suggestions or recommendations for the landscape plan. The first was to propose additional shrubs as buffer between the outdoor patio and the storm water management area southeast of the building. This recommendation was implemented and the revised draft landscape and lighting plan now reflects these improvements.

The second recommendation of Technical Staff was additional plantings between the existing parking lot and University Boulevard. Petitioners responded to Technical Staff that there was an existing berm and sufficient trees and shrub plantings in this area, and Staff concurred, as confirmed by an e-mail of February 18, 2010, from Mr. Kronenberg (Exhibit 29). Thus, the only difference between the draft landscape and lighting plan (Exhibit 28), and Exhibit 5 is the additional buffering around the storm water management facility and the proposed sign detail be added in the landscape plan.

In Ms. Singh's opinion, the proposed structure will be well-related to the surrounding area in its landscaping. The strategic location of the proposed building within the site, coupled with the landscape buffering and the screening, would help the building blend well and relate to its surroundings. The proposed structure will have suitable landscaping and screening consisting of plantings or fencing. This landscape and lighting plan, Exhibit No. 28, accurately reflects the revisions to the preliminary forest conservation plan that Park and Planning has requested.

There are existing lighting fixtures in the front of the existing building as pole lights, and in the back of the existing building, there are wall-mounted fixtures on the building. The new lighting

proposed for this plan is 14 wall sconces all around the perimeter of the proposed addition, and there would not be any additional freestanding lights proposed as part of this plan. The lighting analysis of the photometric characteristics indicate that the lighting levels will be 0.1 footcandles or less, few feet away from the proposed building and so considering that, they will be much less at the property line. And these are modest wall-mounted fixtures which will be full cut-off. According to Ms. Singh, the proposed light fixtures would not likely contribute any glare or trespass at the adjoining property line. Photometrics for the entire site will be shown in a revised plan.

Petitioners are proposing a new V-shaped sign that would replace the existing sign at University Boulevard, and this would be a non-illuminated, freestanding sign. The details are indicated on the landscape and lighting plan which is Exhibit 28, and it conforms to all the requirements of Section 59-F of the Zoning Ordinance. The location relative to the entrance is something which is pending approval from DPS. The fact that it's a V-shaped sign would provide better visibility from both north and south moving traffic.

4. Scott Knudson (Tr. 88-111):

Scott Knudson testified as an expert in architecture. He first explained the photometric graphic on the landscape and lighting plan, and he noted that by 10 feet away from the existing building, the light has fallen off to statistically zero. Since the proposed building is more than 10 feet from the property line, the lighting being added will not exceed footcandle limit at the property line.

The new addition will be perpendicular to and completely behind the existing building, not visible from University Boulevard other than maybe for a brief moment to a pedestrian as they cross the drive line and peek down. Exhibit 6(b) is the first floor plan of the building, an enlargement of this area of the site plan. You enter the building from the parking lot. Petitioners are proposing

adding a new glass vestibule. That glass vestibule will be entirely beneath an existing canopy so it's not increasing the roof area of the building but it will be an enclosure for energy efficiency and weatherization.

The existing building and addition will function as a single united whole. [Mr. Knudson's testimony about the connection of the two buildings on the first floor plan is not summarized here because it was superseded by the next witness, Dwight Mayes, who testified that the first floor plan (Exhibit 6(b)) will be changed by eliminating the connection between the existing building and the addition, at that first floor level. Instead, the buildings will be connected only at the terrace (ground) level by an enclosed corridor, as shown in Exhibit 6(e). A revised first floor plan will be submitted to so reflect.¹¹ Tr. 124-127.]

The addition has been held away from the building rather than pushed up onto it so that light can still reach the individuals with windows in the back. There will be an elevator in the addition as well as in the existing building, and a stairway. Mr. Knudson indicated that the buildings connect at the terrace level. There are also building support functions, electrical room, sprinkler room and so on. Activity rooms open onto the porch, and the storm water management pond is in this general area to the southeast of the addition.

He also described the other floors. On the fourth floor, Petitioners have omitted two more units at the southeast corner of the building to step the height of the building down so although this is a four-story structure, closest to the single-family homes, it's only a three-story building. The east elevation has a similar step where on the northern side of the building. You also can see this in the elevations. The proposed building is slightly shorter than the existing building so it will be completely behind the existing building as seen from the street. The existing building is four stories

¹¹ The revised first floor plan was submitted after the hearing as Exhibit 33(b).

plus terrace. The addition will be three stories plus terrace. Exhibit 8 is a sketched view from the southeast corner of the site looking across the pond towards the patio, the community areas and the four-story addition with the three-story roof, the step down room in this area. You can see the existing building beyond.

Petitioners have kept the new building as far south as possible, in part to keep it as far away from the townhouses to the north, and also, because of the grade. The grade starts to drop about the midpoint of the existing building. Looking at the back of the building, the right half of the existing building grade is at first floor level, and then at the left half, the grade drops down. So the addition will be built in the area where the grade is about 10 feet lower than on that hill, and the apparent height of the new building, as seen from the townhouses to the north and some of the houses to the east, will be lessened. That also actually helps with noise issues because the noise of the work will hit that hill surface and will be partially absorbed and reflected. Obviously, some noise will travel over the hill to the Buckingham Terrace townhouses in the northwest. Directly to the rear of the lot in question are single-family detached homes.

There are three single-family homes directly behind the site to the east, and one that's to the southeast. And then there are four townhouses to the north that have a clear line of sight over the fence if you will to the proposed addition. The other seven townhouses are actually north of the existing building and north of the parking lot, and they will be less impacted visually or audibly.

In Mr. Knudson's opinion, the landscaping will not be a sound barrier because you would need a deeper section of forest for it to actually absorb a significant amount of sound. There will be some benefit from it acoustically but it's not going to stop all the noise. Visually, it will screen it and filter it so that when leaves are out, the visual impact will be ameliorated. When leaves are not out, they will be able to see the building through them.

According to Mr. Knudson, the HVAC equipment will be mounted on the roof. Although the final selection has not been made, it's most likely going to be a heat pump system with 27 small condensing units on the roof. They will not cause any objectionable noise, as they will produce the same noise level as in a house, and the fact that they're up reduces the amount of noise that one would hear offsite. The parapet walls further reduce it. There are no other elements of the proposed design that will cause objectionable noise, vibrations, fumes, odors, dust, illumination or glare.

Mr. Knudson further testified that the proposed addition will be ADA compliant. There will be full accessibility into the public spaces in the common areas and the corridors, and three of the units will be handicap accessible to meet uniform federal accessibility standpoints.

In Mr. Knudson's opinion, the proposed addition will comply with the Zoning Ordinance requirements for a special exception in a residential zone regarding compatibility and exterior appearance. It will maintain consistency with the context in terms of scale and size. It will be slightly lower than and not as long as the existing apartment building. It also steps down at the rear as it approaches the single-family homes, and the building will be sited to take advantage of the topography to reduce its apparent scale. Finally, materials that are residential in feel and are typical of buildings of this type will be used (brick and siding), with window fenestration patterns that are very residential in scale and style.

In Mr. Knudson's opinion, the proposed addition will be in harmony with the general character of the neighborhood considering the design, scale, height and bulk of the proposed addition. It will also be well-related to the surrounding area in its siting, scale, bulk, height materials and textures, and will have a residential appearance throughout. It will look very much like most residential multi-family buildings in the County.

Mr. Knudson described the construction process. The building materials will be concrete slab on the grade, and then the rest of the building will have wood framing. So it's residential construction type of a very similar type that of the townhouses. Mr. Knudson estimates a 12 to 14 month cycle for the total construction. During that cycle, the noise produced drops over time, so much of the loudest noise is the early stages of construction, specifically during excavation and any site work. Some of the utilities will be extended from the existing building, so there's less digging and less work associated with that. The soil is relatively good so he does not anticipate deep foundations or the need to drive piles or the like. He expects to use concrete footings.

Mr. Knudson anticipates two to three or four months of site work with backhoes, concrete trucks backing in and the like. Then the process would move to framing the structure for another two to four months, and the primary noise associated with that would be nailing guns as they're putting up the walls, and possibly some cranes that might come in to lift trusses. Once that's done, quieter trades such as putting on siding or masonry take place, and then the work moves inside. At the very end of the job, there will probably be a some more site work to level out the grades and the like. Since no new parking lots or roads will be created, that whole area of noise creation will be avoided.

Relative to Ms. Holleran's request to delay the start of construction on a daily basis, Mr. Knudson indicated that typical contractors will want to start very early, sometimes as early as 6 o'clock. Thus, even the 7 o'clock County legislation puts a little crimp in some of their working style, but it's something they'll do and they're used to. As that is pushed later into the day, it starts to affect the cost of construction and it also can affect the schedule. The more the working hours are restricted, the more costs will be driven up and the schedule extended. This facility is subsidized through HUD funding. [Petitioners' counsel indicated that Section 31-B-6 of the County Code

provides for noise levels over those regularly associated with residential housing between the hours of 7:00 a.m. to 5:00 p.m. for construction.] Typically, the crews do not work Saturday and Sunday unless they're making up time. According to Mr. Knudson, it's good to have that flexibility to shorten the construction cycle and control costs for the affordable housing. The contractor is bound by decibel levels at the property line. That doesn't necessarily prevent a crew from showing up to install sprinkler piping on a Saturday or Sunday.

Mr. Knudson could not think of any other steps that could be taken, aside from restrictions on hours and days, that can reduce the level of construction noise during construction. He did not know what the acoustical impact of a temporary wooden fence on the intervening hill might be.

5. Dwight Mayes (Tr. 118-141):

Dwight Mayes testified that he is the Director of Housing for NCBA Housing Management Corporation. NCBA is an acronym for the National Caucus and Center on Black Aged. NCBA Housing Management Corporation assisted in the development of the existing 65-unit University Gardens facility as development consultants for the financing of that property. It was financed through the U.S. Department of Housing and Urban Development (HUD) under Section 202 Direct Loan program. After the construction of that property, NCBA Housing Management Corporation was retained as managing agent for the facility in 1991. That relationship continues to today.

The management agent is responsible, under the direction and on behalf of the owner, for the day-to-day operations of the facility. That encompasses administrative, financial and physical operations of the facility. He is responsible for obtaining the financing for University Gardens. HUD financing for the 27 new units will be under the Section 202 Grant Application program sponsored by the U.S. Department of Housing Urban Development. NCBA Housing Management

Corporation submitted an application for the grant funding in the fall of 2009 and that application is pending with the Department.

Mr. Mayes testified that Petitioners will be are in compliance with Section 59-G-2.35(a)(1), (C), very low income, because 100 percent of the units, both existing and proposed units, will be reserved for households at or will be at or below 50 percent of the median area income. The existing facility is comprised of a total of 65 units, 48 of which are one-bedroom, 16 are efficiency and there is a two-bedroom unit that is occupied by the housing manager. All of the units, both existing and proposed, are for the very low income level. It will be considered one facility. He introduced a HUD publication, "2009 Income Limits Documentation System" (Exhibit 32) describing those income limits for the HUD Metro fair market area. This includes areas of Montgomery County, Prince George's County and several other counties related in Northern Virginia.

Mr. Mayes further testified that, contrary to Mr. Knudson's testimony, the first floor plan (Exhibit 6(b)) will be changed by eliminating the connection between the existing building and the addition at that first floor level. Instead, the buildings will be connected only at the terrace (ground) level by an enclosed corridor, as shown in Exhibit 6(e). A revised first floor plan will be submitted to so reflect.¹² Tr. 124-127.

As part of the design, there will be common areas to the existing facility such as a resident's lounge, a kitchen, a multi-purpose kitchen that will be used for both, and the annex will provide an additional patio with another multi-purpose room or resident lounge for that section as well.

According to Mr. Mayes, the average age of the residents at University Gardens is 77.6 years. The occupancy of the 27-unit addition will be restricted to senior adults, their spouses and/or

¹² The revised first floor plan was submitted after the hearing as Exhibit 33(b).

caregivers, disabled persons and an onsite manager. University Gardens currently has four staff members. There is a housing manager who is in charge of the day-to-day operations of the facility, and an assistant housing manager. They take care of the administrative procedures of the management operations, and there are two maintenance technicians, one for repair services and the other for custodial and grounds. No new employees are being proposed as part of the requested special exception modification because the additional 27 units will not make a significant impact on the maintenance operations and management's ability to serve the residents. The current staffing is what is ordinarily used for 100-unit facilities.

Mr. Mayes further testified that no more than 15 of the current residents own vehicles. That includes the housing manager who lives on site. There might be an additional 4 cars for employees. A very small number of the new residents on the waiting list presently own cars, so he does not expect additional demands of any significance on the parking facility.

Mr. Mayes indicated that residents have the right to go in and out as they please. They don't have to check in with anybody or check out with anybody. Management asks, for safety, that residents sign in and out as they leave the facility, but its not a requirement for occupancy. Individual units are maintained by the residents.

Mr. Mayes testified that University Gardens operates between 8:00 a.m. and 5:00 p.m. It operates like any other multi-family residential facility where individual households can order certain services directly from suppliers. It is not a nursing facility or an assisted housing facility where such supplies are ordered by the facility. University Gardens does not serve meals or distribute medical supplies. [Mr. Klauber opposed conditions recommended by Technical Staff controlling food and medicine deliveries to the facility and waste collection because this is an independent senior living facility, not a nursing home or assisted living facility. Tr. 134-136.]

Mr. Mayes further testified that the residents of the addition will have adequate accessibility to services such as medical services, shopping, recreation and community services, as shown in Exhibit 13(c), the area service map. There is a Ride On bus stop right at the property walkway in front of the building, and there's a multitude of services of both shopping, medical as well as transportation services well within the one mile radius. Private organizations also provide additional services and transportation (*i.e.*, they are not administered by University Gardens). There is an adult daycare service that picks up residents daily and provide medical, recreational as well as food, outings for existing residents. It also provides them a shuttle service for groceries. Those services will continue with the additional 27 units. There is also a shuttle available for church services on Sunday. There will be no retail facilities that will be provided to the residents within the addition.

Mr. Mayes testified that he has never received any complaints from any of the communities with regard to University Gardens residents wandering.

He testified that HUD required the existing sign to be changed because language on the existing sign restricts the occupancy to Koreans, and that violates fair housing rules. This is an open housing facility and the new sign will so reflect.

Finally, Mr. Mayes noted that Petitioners had to be very cautious about costs for things like a noise barrier because financing is very limited.

6. Theodore Ungchang Kim (Tr. 142-144):

Theodore Ungchang Kim testified that he is the President and Chairman of the Board of both Petitioners. Mr. Kim indicated that University Gardens was built because there was a strong need for low-income housing for the first generation of immigrants who reached retirement age and especially for those disabled and needy seniors. "University Gardens has become a community of seniors where they find a sense security and happiness as they are surrounded by friends and cared

[for] by the community with the various services and program. The Board of Korean Community Senior Housing Corporation has been very diligent to satisfy their needs through the excellent management of NCBA. We, at the Board, are trying to make the lives of these seniors as comfortable and as happy as possible.” Tr. 143.

Mr. Kim further testified that, since its opening, University Gardens has been fully occupied. At the present time, the waiting list has 17 applicants. Most of them have been on the waiting list for the last three years. According to Mr. Kim, it is well-known in the community how wonderful University Gardens is but they also know that there is no vacancy. The need of low-income housing for seniors, like University Gardens, has been growing much faster than communities can keep up with the demand. Mr. Kim also expressed his appreciation for the County’s assistance in this endeavor.

B. Community Witness

Linda Holleran, Individually and as President of BTHOA (Tr. 15-20):

Linda Holleran testified on her own behalf and as President of the Buckingham Terrace Homeowners Association. She stated that BTHOA has three concerns, but “We don’t have a general objection to them making the addition. . . .”

The first concern is about anticipated construction noise while the addition is being built. BTHOA consists of 11 townhouse units that run alongside the entire length of the University Gardens property, perpendicular to University Boulevard, so all of their families will be affected by this. Her understanding is that construction will start at 7:00 a.m. each day. This is a residential area on both sides, and she believes that for residential areas, construction is not supposed to begin until 8:00 a.m. or after. She asks that construction not begin before 9:00 a.m. because it will continue for

18 months or more. [Petitioners' counsel would not agree and indicated that the Montgomery County Code noise requirements permit construction to start in residential areas at 7:00 a.m.]

The second concern Ms. Holleran raised is traffic. One cannot make a left turn directly into University Gardens, and people make a U-turn at Buckingham Drive, which has no turn signal, in order to be able to turn into University Gardens or onto Glouster Knoll Drive. According to Ms. Holleran, that intersection is already congested. Her concern is that adding the 27 additional units with people who not only may have cars but also will have visitors, will have more activity, and will result in increased congestion. She would like a turn signal.

The last item raised by Ms. Holleran was personal (*i.e.*, not an issue raised by BTHOA). She is a little concerned that Petitioners weren't planning on adding on any employees for the 27 additional residents. Ms. Holleran indicated that there have been "issues with some of their residents wandering over to our units and ringing the doorbells even at late hours and so we would hope that there would be some additional supervision or something." Tr. 19. On cross-examination, she indicated that it had only happened to her once.

C. The People's Counsel

Martin Klauber, the People's Counsel, did not call any witnesses, but he participated in the hearing and supported the petition. Tr. 148.

The Office of the People's Counsel absolutely recommends that the modification be approved by the Board of Appeals. And I'd like to opine ahead of time that I do not believe, based on what you have heard, that the staff's recommended Conditions 3 and 4 are either relevant or appropriate.

Mr. Klauber opposed those conditions recommended by Technical Staff controlling food and medicine deliveries to the facility and waste collection because this is an independent senior living facility, not a nursing home or assisted living facility. Tr. 134-136.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. In Part I. B. of this report, we noted that, given the proportions of the increase in the use and the visual impact of a four-story building on adjacent property owners, substantial adverse effects on the surrounding neighborhood could reasonably be expected. In the typical special exception, the Board could therefore require, pursuant to Zoning Code §59-G-1.3(c)(4), that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26. However, special exceptions for senior housing have a grandfathering provision built into the Zoning Ordinance, Section 59-G-2.35 (h)(1). Under the terms of that section, only the proposed modifications must be in compliance with the current standards.

As discussed in the following pages, based on the testimony and evidence of record, the Hearing Examiner concludes that the use, as modified, will meet both the general requirements for special exceptions and the specific requirements spelled out in Zoning Ordinance §59-G-2.35 for housing for senior adults, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Zoning Ordinance § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with housing for senior adults. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modifications that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff listed the following inherent characteristics associated with Housing and Related Facilities for Senior Adults and persons with Disabilities (Exhibit 16, p. 8):

- (1) buildings and structures, as well as outdoor passive areas for the residents and visitors;

- (2) lighting;
- (3) traffic to and from the site by staff, visitors and residents;
- (4) deliveries of supplies and trash pick-up,
- (5) parking areas;
- (6) noise associated with the loading and unloading of food and equipment and garbage pick-up.

The Hearing Examiner agrees, in general, with this list, but notes that in an independent living facility such as the one under review, there is no organized unloading of “food and equipment,” as was discussed elsewhere in this report. Petitioners land planner, John Sekerak, testified that there are no non-inherent adverse effects associated with this facility. “The existing use and the proposed addition have the typical inherent effects of building, bulk and mass, concentration of older residents, parking facilities and dumpster facility. That type of thing. But it has no identifiable adverse non-inherent effects.” Tr. 49. Technical Staff agreed, stating, “There are no non-inherent adverse affects associated with the application.” Exhibit 16, p. 8.

The Hearing Examiner finds that the inherent characteristics of an age restricted, independent living, residential facility are typical of any multi-family residential facility, except that residents are older and there will be many fewer children around, thus reducing noise and car trips. Due to differences in the number of dwelling units which may exist in any given senior housing residence, the size of the building and parking facilities will vary considerably, as will the amount of traffic generated. Thus, no particular size or scale can be identified as an inherent characteristic.

Technical Staff found that “the inherent characteristics of size, scale and scope associated with the proposed application are minimal and not likely to result in any unacceptable noise, traffic disruption, or environmental impacts at the proposed location.” *Id.* p. 8.

There appears to be nothing atypical about the proposed modifications to the existing senior housing that would create non-inherent adverse effects. Its size and bulk do not seem excessive for the area, and its operational characteristics will be very similar to what now exists. Based on the entire record, the Hearing Examiner finds that the proposed modifications would not have any non-inherent adverse effects on the neighbors.

B. General Standards

The general standards for a special exception are found in Zoning Code Section 59-G-1.21(a). The Technical Staff reports and the Petitioners' exhibits and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Zoning Ordinance §59-C-1.31(a) permits housing for seniors or those with disabilities as a special exception in the R-60 Zone, and this special exception was approved by the Board of Appeals in 1987.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modifications would comply with the standards and requirements for housing for seniors set forth in Code §59-G-2.35, as detailed in Part IV.C., below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted*

by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property at issue is subject to the *East Silver Spring Master Plan*, approved and adopted in 2000. For all the reasons set forth in Part II. B. of this report, the Hearing Examiner concludes that the proposed modifications are consistent with the goals and recommendations of the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: Technical Staff found that the proposed modifications would be in harmony with the general character of the neighborhood, considering population density, design, scale and bulk of the proposed new structures. Exhibit 16, p. 9. The Hearing Examiner agrees with Staff. The proposed four-story addition will be located approximately 60 feet from the nearest single-family home and 170 feet from the townhouses to the north. The scale and height of the new addition (approximately 36 feet in height) will be less than the existing building, behind which it will be hidden. Moreover, it will be stepped down in the rear to make it less bulky, and it will have a residential design.

Because it is housing for seniors, the proposed addition will generate very little traffic and parking. Based on all the evidence, the Hearing Examiner concludes that the proposed addition will exist in harmony with its neighborhood. Technical Staff reports, and the Hearing Examiner finds, that the site is adequately served by public facilities and will continue to be adequately served under the growth management policies in effect when the application was filed. Exhibit 16, p. 11.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the requested modifications would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site. The use is residential in nature, and the subject site is adjacent residential uses. The proposed building conforms to the residential character of the neighborhood, and will fit harmoniously within the context of the surrounding residential uses and the general neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The use is residential and will create no noise that is inconsistent with other residential uses in the surrounding neighborhood. According to Mr. Knudson, Petitioners' architect, the HVAC equipment will be mounted on the roof. Although the final selection has not been made, it is most likely going to be a heat pump system with 27

small condensing units on the roof. They will not cause any objectionable noise, and the fact that they will be on the roof will reduce the amount of noise that one would hear off site. The parapet walls further reduce it. Tr. 102-103. There are no other elements of the proposed design that will cause objectionable noise, vibrations, fumes, odors, dust, illumination or glare. Given that the proposed addition will house senior adults, the absence of children will undoubtedly reduce the amount of noise and physical activity at the site. Moreover, conditions have been recommended in Part V of this report which will require Petitioners to comply with County noise ordinances and to begin construction at the site after 8:00 a.m.

The revised landscape and lighting plan (Exhibit 33(g)) demonstrates that the proposed new lighting will have no adverse impact on adjoining properties.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The Hearing Examiner finds that the proposed modifications, which are consistent with the Master Plan, will not increase the number, intensity, and scope of approved special exceptions in the area enough to affect the area adversely or alter its residential nature. The special exception use currently exists on site; it is merely being expanded. Staff has identified only two other active special exception uses nearby. Board of Appeals case No. S-1081 is an accessory apartment at the corner of East University Boulevard and Wayne Street, and S-1591 is a non-resident medical practitioner's office located at the corner of East University Boulevard and Buckingham Drive.

There is no evidence that the proposed addition to the existing senior housing would produce any adverse effects, and the Hearing Examiner so finds.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed modifications would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. In fact, the proposed project will benefit the neighborhood by providing a needed service to the community.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 16, p. 11), and the evidence supports this conclusion, as discussed in Part II. D. of this report.

(A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The modifications sought in this case will not require approval of a preliminary plan of subdivision. Therefore, the Board of Appeals must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (PAMR). As indicated in Part II. D. of this report, Technical Staff did do such a review, and concluded that the proposed addition would generate fewer than 30 peak hour trips and fewer than 4 new peak hour trips; therefore, the special exception application is not subject to either Local Area Transportation Review (LATR) or Policy Area Mobility Review (PAMR). Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

As reported in Part II.D., there is one complication – there is an existing adequate public facilities (APF) agreement which limits development on the site to 65 units. It was executed by Petitioners and the Planning Board at the time of the initial special exception and approval of the preliminary plan of subdivision. Technical Staff determined that the best vehicle for having that agreement rescinded would be a minor preliminary plan amendment. That amendment would be a consent item with the Planning Board, and it would not have an APF component to it; rather, it would simply have the Planning Board rescind the APF agreement. Thus, the preliminary plan will remain, but it will not have an APF component. According to Mr. Sekerak, preliminary plans do not have APF agreements anymore, so the existing one will not need to be replaced; it would just be extinguished. Petitioners’ attorney asked that the Board of Appeals impose a condition stating that the current APF agreement must

either be modified or extinguished to allow for the additional 27 units (Tr. 55), and the Hearing Examiner has recommended such a condition in Part V of this report.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: As mentioned in Part II. F. of this report, Ms. Holleran raised a concern about the safety of u-turns at the intersection of East University Boulevard and Buckingham Drive because there is no turn signal at that intersection. Whether or not the state elects to add a turn signal at that intersection, the Hearing Examiner finds that the increase in traffic to that intersection, if any, from the proposed addition would be so small, based on the evidence of record, that it cannot be said to render the intersection less safe. Mr. Sekerak addressed pedestrian and vehicular safety in his land planning report (Exhibit 12, p. 11):

The existing entrance to the site and sidewalks will remain unchanged from current conditions. However, vehicular and pedestrian safety accommodations have improved markedly since the original approval in 1987. The installation of a traffic signal at the Buckingham Drive intersection creates gaps in the University Boulevard traffic flow for the vehicles exiting the site at the right-in/right-out only driveway. The addition of pedestrian crossing signals and pedestrian crosswalk markings at the same intersection aids the residents as they use the sidewalk network. The property management professionals for the facility have indicated that they are not aware of any incidents involving vehicles/pedestrians directly related to the driveway entrance on University Boulevard or the sidewalk along the site frontage.

Technical Staff's found that "The proposed addition to the senior housing facility will not adversely affect area pedestrian accessibility or safety." Exhibit 16, p. 6. Based on this record, the Hearing Examiner finds that the modification will not reduce the safety of vehicular or pedestrian traffic.

C. Specific Standards: Housing for Senior Adults

The specific standards for senior adult housing are found in Code § 59-G-2.35. The Technical Staff report and the Petitioners' exhibits and testimony provide sufficient evidence that the proposed modifications would be consistent with the specific standards, as outlined below.

Sec. 59-G-2.35. Housing and related facilities for senior adults and persons with disabilities.

A special exception may be granted for housing and related facilities for senior adults or persons with disabilities, subject to the following provisions:

(a) *Prerequisites for granting:*

(1) *A minimum of 15 percent of the dwelling units is permanently reserved for households of very low income, or 20 percent for households of low income, or 30 percent for households of MPDU income. If units are reserved for households of more than one of the specified income levels, the minimum percentage must be determined by agreement with the Department of Housing and Community Affairs in accord with Executive regulations. Income levels are defined as follows:*

(A) *"MPDU income" is the income limit determined by the Department of Housing and Community Affairs in the administration of the moderately priced dwelling unit (MPDU) program, as prescribed by Chapter 25A.*

(B) *"Low income" is income at or below 60 percent of the area median income adjusted for household size.*

(C) *"Very low income" is income at or below 50 percent of the area median income adjusted for household size.*

(D) *"Area median income" is as determined annually by the U.S. Department of Housing and Urban Development.*

Conclusion: The above-quoted provision may be satisfied by Petitioners complying with one of three alternative criteria – 15% of the dwelling units reserved for households with “very low income” (defined as “income at or below 50% of the “area median income” or AMI); or 20% of the dwelling units reserved for households with “low income” (defined as “income at or below 60% of the AMI); or 30% of the dwelling units reserved for households with “MPDU income.”

This facility provides housing for low income persons and is financed through federal programs administered by the Federal Department of Housing and Urban Development (“HUD”). Occupancy of the facility will be restricted to applicants with a minimum age of 62 or with disabilities, whose incomes do not exceed 50 percent of the area median income (*i.e.*, defined as “very low income”). Tr. 123. With the exception of a single unit that is reserved for resident staff, all of the proposed units will meet the requirements.

(2) *The site or the proposed facility has adequate accessibility to or provides on site public transportation, medical service, shopping areas, recreational and other community services frequently desired by senior adults or persons with disabilities.*

Conclusion: The evidence supports the conclusion that the proposed use would have adequate access to these services. As noted by Technical Staff, and discussed in more detail on pages 25-26 of this report, the site of the proposed facility has adequate accessibility to public transportation, medical service, shopping areas, recreational and other community services. Exhibit 16, p. 14. Based on this record, the Hearing Examiner finds that residents at the proposed addition will have adequate access to needed services.

(3) *The site or the proposed facility is reasonably well protected from excessive noise, air pollution, and other harmful physical influences.*

Conclusion: Technical Staff reports the following (Exhibit 16, pp. 14-15):

Due to the existing pattern of development in the area, which is characterized by residential developments and institutional uses (churches and schools), the subject property is not likely to be susceptible to air pollution and other harmful physical influences. Given the placement of the building on the property relative to adjoining properties and roads, and

considering current traffic pattern on the adjacent streets, potential visual and noise intrusion to and from the proposed site would be minimal.

There is no evidence to the contrary. Thus, the record supports the conclusion that the proposed facility will be “reasonably well protected from excessive noise, air pollution, and other harmful physical influences.”

(b) *Occupancy of a dwelling unit is restricted to the following:*

- (1) *A senior adult or person with disabilities, as defined in Section 59-A-2.1;*
- (2) *The spouse of a senior or disabled resident, regardless of age or disability;*
- (3) *A resident care-giver, if needed to assist a senior or disabled resident; or*

Conclusion: As stated in Petitioners land planning report (Exhibit 12, p. 17), “Occupancy is and will be primarily restricted to senior adult residents 62 years and older. University Gardens is not designed primarily for persons with disabilities however persons with mobility features/limitations are also eligible for occupancy.”

- (4) *In a development designed primarily for persons with disabilities rather than senior adults, the parent, daughter, son, sister or brother of a handicapped resident, regardless of age or disability. Additional Occupancy Provisions are:*

Conclusion: Not Applicable. The facility is not planned primarily for persons with disabilities.

- (5) *Age restrictions must comply with at least one type of exemption for housing for older persons from the familial status requirements of the federal “Fair Housing Act,” Title VIII of the Civil Rights Act of 1968, and subsequent amendments thereto. (In that Act, “familial status” refers to discrimination against families with children.)*

Conclusion: Petitioners’ land planning report (Exhibit 12, pp. 17-18) states the following:

Title VIII of the Civil Rights Act of 1968 is otherwise known as the Fair Housing Act. It states that you cannot be discriminated against in any type of housing related transaction because of your Race, Gender, Religion,

National Origin or Color. This Act was amended in 1988 to include Familial Status (i.e. the presence of children under the age of 18 in a family) and Handicap. The Fair Housing Act exempts “housing for older persons” from the Act’s prohibition of discrimination against families with children in these categories: 1) HUD Secretary-designated state or federally assisted elderly housing programs, 2) 100% of the occupants must be 62 years of age or older or 3) 80% of the occupied units must be occupied by at least one person who is 55 or older.

University Gardens occupancy is and will be primarily restricted to senior adult residents 62 years and older and is not designed primarily for persons with disabilities. However, persons with mobility features/limitations are also eligible for occupancy. Units occupied by (non age-restricted) residents with mobility limitations are expected not to exceed 20% of the total units, therefore the project would meet the Fair Housing Act’s exemption from the law’s familial status requirement that 80% of the occupied units must be occupied by at least one person who is 55 or older.

Based on this uncontradicted evidence, the Hearing Examiner finds this facility will be compliant.

(6) *Resident staff necessary for operation of the facility are also allowed to live on site.*

Conclusion: One unit in the facility is, and will continue to be, used for resident staff.

(c) *Development standards, other than density, in residential zones where allowed by special exception:*

(1) *Minimum setbacks:*

(A) *From street: 50 feet. Except for an access driveway, this must be maintained as green area. However, if development does not exceed the height limit of the applicable one-family zone, the minimum setback specified by the zone applies.*

(B) *From side and rear lot lines: 25 feet or as specified by the relevant zone, whichever is greater.*

(2) *Maximum building height: four stories or the height of the applicable zone, whichever is less. Additional height up to six stories is permitted if the additional height is in conformity with the general character of the neighborhood considering population density, design, scale and bulk of the proposed building, traffic and parking conditions.*

- (3) *Maximum lot coverage: As specified by the relevant zone.*
- (4) *Minimum green area:*
- (A) *R-60, R-90, and the RT Zones: 50 percent*
- (B) *R-150 and R-200 Zones: 60 percent*
- (C) *RE-1, RE-2, and RE-2C Zone: 70 percent, except where the minimum green area requirement is established in an approved and adopted master plan.*

The Board may reduce the green area requirement by up to 15% if it is necessary to accommodate a lower building height for compatibility reasons.

Conclusion: Development Standards are set forth in the following table from the Technical Staff report (Exhibit 16, p. 12):

Development Standard Table

	<u>Required</u>	<u>Proposed</u>
Minimum lot area	6,000 sq. ft.	2.08 acres
Lot Width --at front building line --at street line	60 ft. min. 25 ft. min.	266 ft. 264 ft.
Setback from Street (59-G-2.35(c)(1))	50 feet	115 ft.
Setback from Adjoining Lot for Addition (59-G-2.35(c)(1)) --side lot lines --rear lot line	25 ft. 25 ft.	52 ft. 30 ft.
Maximum building height (59-G.2.35)*	2 1/2 stories or 35 ft.	4 stories at 36.7 feet
Building Coverage	35 %	20%
Green Area	50 %	64%

*59-G-2.35 permits: four stories or the height limit of the applicable zone, whichever is less. Additional height up to six stories is permitted if the additional height is in conformity with the general character of the neighborhood considering population density, design, scale and bulk of the proposed building, traffic and parking conditions.

Technical Staff concluded that the proposed modification complies with “all development standards.” Exhibit 16, p. 11. The Hearing Examiner concurs.

Petitioner meets these development standards, even though the proposed building height is higher than standard for the Zone, because the Code specifies that up to six stories is permitted, “[if] *the additional height is in conformity with the general character of the neighborhood considering population density, design, scale and bulk of the proposed building, traffic and parking conditions.*” In this case, the proposed addition would be slightly shorter than the existing building to which it will be connected. It therefore directly conforms to its environs.

- (d) *Development standards, other than density, in the R-30, R-20, R-10 and R-H Zones are as specified by the relevant zone in Section 59-C-2.41, except that the lot coverage and building setbacks may be modified as specified in Section 59-C-2.42 concerning standards for moderately priced dwelling units.*

Conclusion: Not Applicable. The site is in the R-60 Zone.

- (e) *Maximum density:*

In the Rural, Rural Cluster, RE-2, RE-2C, RE-1, R-200, R-150, R-90, R-60, R-40, RT-6, RT-8, RT-10, and RT-12.5 Zones, the number of units is governed by the overall size of the building as determined in accordance with the development standards by Paragraph (c) of this section. Minimum unit size is governed by the minimum space and other relevant standards of Chapter 26, title “Housing Standards,” of this Code, as amended.

Conclusion: The development standards for the R-60 Zone in the Zoning Ordinance do not specify a requirement for the number of units in a senior housing facility of any given size. However, Section 26-5(a) of the Montgomery County Code, which is part of the “Housing and Building Maintenance Standards” specifies the following:

(a) Floor area, dwelling unit. Every dwelling unit must contain at least 150 square feet of floor area for the first occupant and at least 100 additional square feet of floor area for every additional occupant. The floor area of that part of any room where the ceiling height is less than 5 feet or where the room width is less than 7 feet must not be considered in computing the habitable space of the room to decide its maximum permissible occupancy.

Petitioners state in their land planning report (Exhibit 12, p. 19): “Proposed minimum unit size (640 s.f.), minimum ceiling height (8 feet), and other relevant standards are in conformance with the provisions of Chapter 26.” Technical Staff agrees, stating “The proposed building conforms to all applicable development standards for the zone and the use.” Exhibit 16, p. 17. Thus, the Hearing Examiner finds that the proposed development complies with this section.

(f) Parking and loading:

Parking must be provided in accordance with the provisions of Section 59-E-3.7 and Section E-2.83. The Board must require adequate scheduling and long-term continuation of any services for which parking credits are granted in accordance with Section 59-E-3.33(b) and may require additional parking for any facilities and services provided in accordance with Paragraph (g)(2) of this section, if they serve nonresident senior adults or persons with disabilities. When considering the need for additional parking, the Board may consider the availability of nearby public or private parking facilities.

Conclusion: Parking on the subject site meets the parking requirements of the Zoning Ordinance, as discussed in Part II. D. of this report. After receiving a 20% credit pursuant to Zoning Ordinance §59-E-3.33(b), a total of 37 parking spaces are required, and 37 will be provided. Eight of the spaces will be handicapped accessible, and two of those will be van accessible. According to Technical Staff, that satisfies the parking requirement. Exhibit 16, p. 17.

(g) *Additional provisions:*

(1) *One or more of the following ancillary facilities and services may be included to serve the residents and possibly nonresident senior adults or persons with disabilities. The Board may restrict the availability of such services to nonresidents and specify the manner in which this is publicized.*

- (A) *Provision for on-site meal service;*
- (B) *Medical or therapy facilities or space for mobile medical or therapy services;*
- (C) *Nursing care;*
- (D) *Personal care services;*
- (E) *Day care for senior adults or persons with disabilities;*
- (F) *On-site facilities for recreation, hobbies or similar activities; or*
- (G) *Transportation to such off-site facilities and services as shopping, religious, community or recreational facilities, or medical services.*

Conclusion: This provision is not mandatory, in that it indicates that the listed services “may be included.” Technical Staff summarizes the services available on site, although many are provided by service organizations (Exhibit 16, p. 18):

The applicant stated that the existing building has a resident activity room for purposes such as recreation, instruction, hobbies, crafts, and exercise classes. The proposed addition will have a similar room to expand the availability of common area for similar activities. There is a proposed patio area related to both the existing and proposed activity rooms to provide a complimentary outdoor area for associated activities. According to the applicant, local facilities and organizations provide shuttles that pick up and drop off residents of the facility at the property. There are three different local adult day care centers that pick-up residents and take them to nearby adult day care centers during the day. The shuttle pick-up occurs between 7 a.m. – 7:30 a.m. and residents are dropped off between 1:45 p.m. – 2:30 p.m. Services provided at the adult day care centers include a pharmacy, meals, a nurse practitioner, social worker and senior social activities. A local Korean grocery store also shuttles residents weekly between the facility and the grocery store.

(2) *Retail facilities may be included to serve exclusively the residents of the building.*

Conclusion: Petitioners do not propose any retail facilities on site.

(3) *The application must contain a vicinity map showing major thoroughfares, public transportation routes and stops, and the location of commercial, medical and public services within a one-mile radius of the proposed facility.*

Conclusion: Such a vicinity map is in the record as Exhibits 13(c).

(4) *Construction is subject to all applicable Federal, State and County licenses or certificates.*

Conclusion: A condition so requiring has been recommended.

(h) *Provisions governing facilities approved prior to March 7, 1990:*

(1) *A housing facility for senior adults or persons with disabilities existing before May 6, 2002, is a conforming use and structure, and may be continued in accordance with the terms and conditions of the special exception grant. Modifications may be approved that are in compliance with the special exception standards in effect at the time the modification is filed. If damaged, the facility may be rebuilt, repaired or reconstructed as it existed on May 6, 2002.*

(2) *A housing facility for senior adults or persons with disabilities existing on March 7, 1990, or for which a petition was approved prior to March 7, 1990, located on property containing at least 85 acres of land, may be extended, enlarged, or modified in accordance with the special exception standards in effect prior to March 7, 1990.*

Conclusion: As discussed in Part I. B. of this report, this provision grandfathers the terms and conditions for the existing building, but applies all current regulations for the modifications. Based on the record, the Hearing Examiner finds that the modifications do comply with current standards.

D. Additional Applicable Standards

59-G § 1.23. General development standards

(a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The discussion on pp. 77-79 of this report and the Table reproduced on page 77 demonstrate Petitioners' compliance with all the applicable development standards for the R-60 Zone and the special exception.

- (b) **Parking requirements.** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Parking requirements have been discussed in Part II. D. of this report and on page 79 of this report in connection with the specific requirements of the special exception. Petitioners meet all parking requirements.

- (c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
 - (6) *Riding stables.*
 - (7) *Helipport and helistop.*

Conclusion: This section is not applicable.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: As stated in Part II.E. of this report, the property is subject to the Montgomery County Forest Conservation Law, and the Planning Board has approved the Preliminary Forest Conservation Plan (PFCP) Exhibits 39(a), (b) and (c). Compliance with the PFCP is a condition recommended in Part V of this report.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: This section is not applicable because the subject site is not in a special protection area, and therefore a water quality plan is not required. Nevertheless, it should be noted that the Department of Permitting Services (DPS) approved the Stormwater Management Concept Plan (Exhibit 10(b)) on August 27, 2009 (Exhibit 10(a)).

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: A V-shaped entrance sign has been proposed. It is depicted on Petitioners' revised landscape and lighting plan (Exhibit 33(g)), and that diagram is reproduced on page 23 of this report. The Hearing Examiner has recommended a condition requiring Petitioners to obtain a permit for its planned sign, and to submit copies of the permit to the Board of Appeals prior to posting of the sign.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The use is residential in nature, and the proposed building conforms to the residential character of the neighborhood. As stated by Technical Staff (Exhibit 16, p. 13):

The proposed addition to the existing facility is located behind the existing building and is oriented so as to minimize the appearance of bulk and mass as it appears from the nearest residential homes. The

adjacent highway separates the site from properties to the west and provides convenient access to the facility. The diversity of surrounding uses such as townhouses, a church, single-family detached homes and a doctor's office provides a diverse neighborhood setting that is appropriate for the expansion of the existing use. . . .

The Hearing Examiner agrees and so finds.

(h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The revised landscape and lighting plan (Exhibit 33(g)) demonstrates that the proposed new lighting will not exceed 0.1 footcandles at the property line and will have no adverse impact on adjoining properties. As discussed in Part II. C. of this report, the existing lighting is grandfathered by virtue of Zoning Ordinance §59-G-2.35(h)(1).

Based on the testimony and evidence of record, I conclude that the modifications proposed by Petitioners meet the specific and general requirements for the special exception, and that the petition should be granted, with the conditions recommended in the final section of this report.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition numbered S-1424-A, in which Petitioners Korean Community Senior Housing Corporation of Maryland, Inc. and Korean Community Senior Housing Corporation of Maryland, Inc. II seek to modify a special exception to permit the additional facilities

and tenants at a senior housing residence at 440 East University Boulevard, Silver Spring, Maryland, be ***granted*** with the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception remain in full force and effect, except as modified in the Board's order granting this modification request.
3. The addition proposed for this property is limited to 27 units for a total of 92 residential units in the entire facility. The proposed building and the site must comply with the final site, landscaping, lighting and other plans referenced herein.
4. Residence must be limited to senior adults and persons with disabilities, of very low income, as defined by applicable regulations, and one resident staff member.
5. Petitioners must comply with the approved Preliminary Forest Conservation Plan and all applicable stormwater and sediment control regulations.
6. Petitioners must obtain a permit for its planned new sign, and must submit copies of the permit to the Board of Appeals prior to posting of the sign.
7. Petitioners must obtain and maintain all appropriate licensing from Montgomery County and the State of Maryland for continuing operation of an age-restricted, rental housing facility for independent seniors.
8. Petitioners must construct, staff and operate this senior housing facility in accordance with all federal, state and local requirements.
9. To clarify a reference in the resolution originally granting this special exception in 1987, the Board does not require this facility to run its own shuttle bus because, as discussed in the

Hearing Examiner's report, the evidence demonstrates that adequate transportation services are available to the residents from other sources.

10. Subdivision is not required in this case, but there is an existing APF (Adequate Public Facilities) agreement with the Planning Board based on the existing 65 units. That APF agreement must either be modified or extinguished to allow for the additional 27 units.
11. Petitioners must comply with all applicable County noise standards. Garbage/dumpster pick-up shall also comply with time-of-day restrictions specified in Chapter 48 ("Solid Waste Regulations") of the County Code (*i.e.*, no pick-ups between 9:00 PM and 7:00 AM on any weekday, or 9:00 PM and 9:00 AM on Sundays and federal holidays).
12. In addition to complying with applicable County noise standards, construction of the proposed addition may not begin before 8:00 a.m. on weekdays and 9:00 a.m. on weekends, until the new structure is enclosed.
13. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 4, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner